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Supreme Court of the United States

Supreme Court, U.S.
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October Term, 1966

No. 709

McCULLOUGH TOOL COMPANY, *et al.*,

Petitioners,

vs.

WELL SURVEYS, INCORPORATED, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

McCullough Tool Company, Robert W. Pringle, Kenneth I. Roulston, George M. Brownell, and Philip W. Martin, Petitioners herein, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on July 22, 1966.

Opinions Below.

This Petition seeks a review of the Judgment of the Court of Appeals for the Tenth Circuit (Appendix p. 37-A), which denies Petitioners' Motion (Appendix, pp. 1-A-36-A), which petitioned the Court of Appeals for the Tenth Circuit to review its decision dated March 17, 1965 (Original Appendix, p. 58a)[1] and reverse it in

[1]To avoid duplication in printing, permission of the Court has been obtained to use the Appendix which was filed in connection with the original Petition for Certiorari. This Appendix will be referred to as "Original Appendix" to distinguish from the Appendix filed with this Petition.

view of this Court's decision in *Graham, et al. v. John Deere Company of Kansas City, et al.; Calmar, Inc. v. Cook Chemical Company; Colgate-Palmolive Company v. Cook Chemical Company*, 383 U.S. 1, 15 L. Ed. 2d 545 (hereinafter referred to as *Graham v. John Deere*). The original Opinion of the Court of Appeals for the Tenth Circuit (Original Appendix, pp. 1a-57a), is reported at 343 F. 2d 381, and the Opinion of the United States District Court for the Northern District of Oklahoma (Original Appendix, pp. 61a-117a) is reported at 199 Fed. Supp. 374.

Petitioners filed a Petition for Writ of Certiorari on July 19, 1965, which was denied.

Following this, this Court's decision in *Graham v. John Deere* was published, whereafter Petitioners' Motion to the Court of Appeals for the Tenth Circuit was filed.[2]

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[2]A Petition for Rehearing before the Supreme Court was filed on a misuse question but not on invalidity of Swift because of our conviction that the proper procedure was to raise this question by bringing a Motion before the Lower Court. In a similar situation, namely, the case of *McCullough v. Kammerer Corporation and Baash-Ross Tool Company*, 65 S. Ct. 293, 89 L. Ed. 273, a question of misuse was first raised before the Court of Appeals and a Petition for Certiorari was filed before the Supreme Court. In that case the Supreme Court refused to grant the Writ because the matter had not been properly raised in the Lower Court. The Supreme Court said:

> "Thus the only question for which we granted certiorari is one not properly raised, litigated or passed upon below. [authorities cited.] The grounds asserted for the allowance of certiorari are inadequately supported by the record, and the writ is therefore *Dismissed*."

The matter was thereafter properly raised in the Lower Court and in the decision of the Ninth Circuit (156 F. 2d 343) the patent in suit was held to be unenforceable because of misuse.

Jurisdiction.

The Judgment petitioned from was entered July 22, 1966, and this Petition is being filed within the time limit.

Jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. This Court granted writs in the *Graham v. John Deere* case because of the serious conflicts of tests of invention being applied by the Courts of the different Circuits; and this Court laid down in no uncertain terms specific and exact rules to be followed by all Lower Courts and by the Patent Office in order to secure uniformity.

The Question is: As a matter of certiorari policy should this Court, in order to fully achieve its purpose in the *Graham v. John Deere* case, grant the writ in this case to compel compliance by the Tenth Circuit with what is in effect a mandate by the Supreme Court in order to secure uniformity of law in all of the Circuits?

2. The Tenth Circuit in its denial of Petitioners' Motion[3] did not have before it any Findings of Fact on: (a) The scope and content of the prior art; (b) The differences between the prior art and the claims in issue; and (c) The level of ordinary skill in the art. The

[3]The Court of Appeals for the Tenth Circuit merely said: "It is further ordered that each of the above motions be and the same are hereby denied." (Appendix, p. 38-A).

Motion asked the Court either to review the case and reverse its decision in view of the *Graham v. John Deere* case, or to remand the case to the Trial Court in order that proper Findings of Fact would be formed by the Court on the three essential factual inquiries required by the decision in *Graham v. John Deere.*

The Question is: Should the Court of Appeals for the Tenth Circuit be required to remand this case to the Trial Court in order that there will be a factual basis on which a decision may be rendered applying the tests demanded by *Graham v. John Deere.*

3. The Trial Court and the Court of Appeals for the Tenth Circuit, in upholding the validity of the Swift patent, held the patent valid on the ground that "new and better results were achieved".

The Question is: Is the ruling of the Courts below upholding validity of Swift using the test of "new and better results" such a departure from the requirements of Rule 35 U.S.C. §103 as interpreted in *Graham v. John Deere* that the decision should be reversed?

4. Did the Court of Appeals for the Tenth Circuit err in ignoring the tests laid down by *Graham v. John Deere* and holding Swift valid by applying the incorrect and repudiated test of "new or better results"?

5. Did the Court of Appeals for the Tenth Circuit err in refusing to remand the case to the Trial Court to make a determination of: (a) The scope and content of the prior art; (b) The differences between the prior art and the claims in issue; and (c) The level of ordinary skill in the art; and to require the Trial Court to apply the test of obviousness as required by *Graham v. John Deere?*

6. Was the subject matter sought to be patented by Swift and the prior art such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains?

Constitutional Provisions and Statutes Involved.

Article I, Section 8, clause 8, of the Constitution of the United States provides:

"The Congress shall have Power

* * *

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; * * *"

35 U.S.C. §103:

"§103. Conditions for patentability; nonobvious subject matter

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

Statement of the Case.

Involved in this Petition is the foremost question of this Court taking appropriate action to compel the Court of Appeals for the Tenth Circuit to follow the law laid down by this Court in *Graham v. John Deere.* Unless this is done there will be no uniformity between the Tenth Circuit and the Supreme Court, nor the Tenth Circuit and other Circuits on how United States Statute 35 U.S.C. §103 is to be interpreted or applied.

The only factual portion involved is the Swift Patent No. 2,554,844 [R. 1109], the prior art with respect to this patent, and, of course, the Findings of Fact by the Trial Court and the statements in the Tenth Circuit's Opinion with respect to this patent.

The Swift patent discloses a simple structure, namely, a device for logging a well and at the same time locating the position of collars of a casing which previously was lowered into the well.

At the time Swift made his invention the logging tool portion of Swift's assembly was on the market and in public use. Swift refers to this in his patent [R. 1109], [duplicated in this Petition for convenience as Exhibit 1] column 1, lines 16 to 30 and column 2, line 55, to column 3, line 12. Swift then states [Column 1, line 31; *et seq.*] that he has found accurate measurements can be made if a casing collar locator is added to the logging instrument which functions to locate the collars as the formations are being located. Starting at column 3, line 13, Swift proceeds to describe the manner in which he adds a magnetic casing collar locator to the standard logging device. That this is all Swift did is emphasized in claims 5 and 6, in

which the first nine lines are describing the standard logging apparatus, and the remaining eight lines describe the casing collar locator with the introductory statement "the improvement which comprises" [see claim 5, lines 70 and 71, and claim 6, lines 9 and 10] [R. 1112-1113].

We make brief reference to the prior art at this point to show the environment in which the patent statutes have been so grossly misinterpreted by the Trial and Tenth Circuit Courts.

At the time Swift made his invention it was old in the art to log wells and it was old to locate collars, both of which have been admitted by Swift [also see Finding of Fact 63, R. 86, Original Appendix, pp. 89a-90a]. It was also old, as shown in the Doll Patent No. 2,476,137 [R. 2793, Ex. 170] to combine a casing collar locator 37 and a Geiger counter 35 on a common cable; and to record their activity by the recorders, 48 for the Geiger counter and 52 for the collar locations.[4] Doll avoids cable error by measuring distance between the formation, the formation marker 15 and the adjacent casing collar joint marked "C", as shown in Fig. 2 of Doll patent [R. 2796].

The patent to Castel No. 2,459,499 [R. 2848, Ex. 229] teaches the use of both a mechanical or electrical casing collar locator for locating casing collars for accurately locating the position of the formation. Castel states:

> "* * * In order to insure a high degree of accuracy in perforating operations, it is desirable to check the position of the perforator as determined

[4]For convenience there is attached hereto as Exhibit A a drawing of prior art devices which will be referred to.

from cable measurements with its position relative to a casing joint the depth of which is accurately known." [Column 1, lines 32-37, R. 2851].

In column 8, he states:

"* * * Inasmuch as the apparatus may be readily lowered into the bore hole on an electric cable, it enables depths determined from cable measurements to be checked against depths determined by computations from measurements of the casing section lengths. By providing for the accurate location of these casing joints, apparatus such as a gun perforator, for example, may be accurately located at the level of a formation to be produced." [lines 37-46, R. 2854].

The Schlumberger prior public use,[5] as shown in the attached Exhibit A discloses two instruments, both of which have a Geiger counter (sometimes referred to as a Geiger-Mueller tube), a casing collar locator, circuitry which extends to the surface of the ground and a recorder at the ground for recording well formations and the casing collars.

Exhibit 215, a log of the Schlumberger Company shows how the formations and the collars are indicated on the recorder at the surface of the ground. One of the Schlumberger instruments includes a single cable 20 [Ex. 228, R. 2847] and the other employs two cables 10 and 11 [Ex. 227, R. 2846].

Schlumberger's employee Ramsay recognized that gamma rays from the formations actuated the recorder and recorded formations at points marked "F" on the

[5]Schlumberger evidence is contained in the Record at 1027 through 1093 and Exs. 214 to 239 [R. 2829 through 2864].

right-hand log of the attached Exhibit A. See R. 1044 and 1048 where Ramsay, referring to these excursions "F" said:

> "These are in response to natural radiation from the formations triggering the radioactive detector."

Also see Ramsay cross-examination [R. 1047, 1048, 1059, 1060, 1065 and 1069].

In the face of the background of the anticipating patents,[*] the Tenth Circuit only considered new results and utterly failed to consider whether or not it was obvious at the time Swift made his invention for a person of ordinary skill in the art to have combined these old elements. The Tenth Circuit utterly turned its back on the question of obviousness, and basing its decision on new result, notwithstanding that it was conscious of what Schlumberger had done, stated:

> "* * * It is also true that the Schlumberger prior use discloses a casing collar locator and a Geiger counter but the collar locator is not magnetic and the Geiger counter is used to locate a radioactive bullet placed in the well before it was cased rather than to detect radioactivity from the earth's formations. * * *" (Original Appendix, pp. 15a-16a).

If the Tenth Circuit had considered the teaching of the Castel Patent [R. 2848], namely, that a mechanical casing collar locator and an electric casing collar locator are the full equivalent of each other, and that Ramsay, in operating the combination casing collar locator and Geiger tube, actually located formations, that

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[*]In this discussion Petitioners are referring to but a few instances of the prior art. In the evidence of this case there are sixteen prior patents and three different public uses.

Court, if it had followed the law of this Court, would most certainly have reached the conclusion of invalidity on the ground of obviousness.

It is clear from the decisions of these lower Courts that they misinterpreted and misapplied the Federal Statute 35 U.S.C. §103.

All of the opinions of these Courts were directed toward whether or not new or better results were accomplished. Not an iota of the Courts' attention was directed to whether or not it would have been obvious to a skilled mechanic to combine a logging tool and a casing collar locator.

The Trial Court's Findings 55, 57 and 62 (Original Appendix, pp. 85a, 86a, 87a and 89a), which appear to be the pertinent ones, are all Findings of first solving of the problem of commercial success, new and useful results, new combination of elements, and lack of anticipation. The Court of Appeals for the Tenth Circuit directed its attention to new and useful results, great utility, lack of anticipation (343 F. 2d 381 at 392, Original Appendix, p. 14a), and in summation of its application of the wrong test which was struck down by this Court in the *Graham v. John Deere* decision, the Tenth Circuit said:

> "* * * *Generally where elements old in the art are united in such a way that a new and useful result is secured or an old result is attained in a more facile, economical and efficient manner, there is a patentable combination.* Bewal, Inc. v. Minnesota Mining and Mfg. Co., 10 Cir., 292 F.2d 159;

> Oliver United Filters v. Silver, 10 Cir., 206 F. 2d 658, cert. denied, 346 U.S. 923, 74 S.Ct. 308, 98 L.Ed. 416." (Emphasis added.) (Original Appendix, pp. 16a-17a).

Again we emphasize the absolute failure of the Trial Court and the Court of Appeals for the Tenth Circuit to make any of the factual inquiries demanded by the Supreme Court in its *Graham v. John Deere* decision.

The Trial Court Did Not Determine "the Scope and Content of the Prior Art."

The first factual determination required by this Court is that of the *scope* and *content* of the prior art be ascertained.

Critically examined, Findings of Fact 53 to 65 [R. 83-86, Original Appendix, pp. 85a-90a] directed to the Swift patent exhibit a total absence of real consideration of the "scope and content" of the prior art. In the entirety of these findings only one prior reference —"the Ennis patent"—is even mentioned. The observation of the Trial Court with respect to that reference is:

> "The prior art, and particularly the Ennis patent, does not *anticipate* Swift. * * *" (Emphasis added) [Finding 62, R. 86, Original Appendix, p. 89a].

The word "anticipate" in patent law has the connotation of negating novelty—a condition of patentability or patent validity defined by 35 U.S.C. 102 alone. Thus,

the "finding" that "the prior art * * * does not anticipate Swift" is merely a finding of *naked novelty* in the alleged invention defined by the Swift claims. This finding has nothing whatsoever to do with either "the scope and content of the prior art" or the question of obviousness under Section 103.[7]

The only other fact finding by the Trial Court which even colorably relates to "the scope and content" of the prior art is Finding 63, which in its entirety states:

> "Magnetic casing collar locators and radioactivity well logging systems were separately known long prior to the invention of the Swift patent. It was also old long prior to the invention of the Swift patent to transmit multiple signals of a common conductor." [R. 86, Original Appendix, pp. 89a-90a].

This finding fails altogether to recognize additional elements of "the *scope* and content of the prior art" acknowledged in the opinion of this Court. It is totally lacking in substance required to satisfy Section 103.

The inadequacy and impropriety of the Trial Court's findings in this regard is inescapable.

There was no factual determination of the content and scope of the sixteen prior art patents or three public uses relied on by Petitioners, and there is *no finding* which satisfies the requirements of Section 103.

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[7] In its *Graham-Calmar-Colgate-Palmolive* opinion, the Supreme Court recognized "three explicit conditions" for patentability—"novelty and utility as articulated and defined in Sections 101 and 102 and nonobviousness * * * as set out in Section 103" (p. 553). In the concurrently rendered *Adams* opinion, the Court observed that "novelty and nonobviousness—as well as utility—must be satisfied in a valid patent."

The Trial Court Did Not Ascertain the Differences Between the Prior Art and the Claims in Issue.

Because the first factual inquiry, namely, that of determining the scope and content of the prior art, was not made, obviously this second factual determination cannot be made.

Findings directed to similarities and differences between the structure at issue and the prior art are a vital part of the investigation which must be made before the third factual finding can be made.

The Trial Court Did Not Determine the "Level of Ordinary Skill" in the Art.

Finally, there is no fact finding of the Trial Court which even mentions the "level of ordinary skill" in oil well logging or oil well tool design as of the time that the alleged Swift invention was made. The bare conclusionary statement that:

> "The new combination of elements forming the Swift invention and their *new mode of operation* was not obvious to those skilled in the art at the time the Swift application was filed." (Emphasis added) [Finding 62, R. 86, Original Appendix, p. 89a].

is *not* a finding of the level of ordinary skill in the pertinent art either as of "the time the Swift application was filed" or as of "the time the [alleged] invention was made" (35 U.S.C. 103).

Without findings on the scope and content of the prior art and the differences between the prior art and

Swift, the precise accomplishment of Swift has not been factually determined, and, therefore, there is no basis upon which to determine if what Swift did was or was not obvious to a person of ordinary skill. Thus, the Supreme Court quite correctly requires that there be a factual determination of the three elements which, as it states, is the background against which obviousness or nonobviousness of the subject matter is determined (*Graham v. John Deere*).

Reasons Why Writ Should Be Granted.

1. There is an irreconcilable conflict between the decision of the Tenth Circuit and the Supreme Court on a Federal Statute, namely 35 U.S.C. §103, and the manner in which that Statute should be interpreted, and more particularly, the test of "new or better results" as applied by the Tenth Circuit versus the factual inquiries as required by the Supreme Court as elucidated in *Graham v. John Deere*. This conflict is a real conflict on the matter of law. This irreconcilable conflict is of major importance because it concerns the tests which are to be applied by all Federal Courts in determining patentability. This Court is a court of law and the question involved is a question of law, although some facts must be considered because obviously the Court cannot consider the legal conflicts *in vacuo*. The Tenth Circuit has either disregarded, misconstrued or misapplied *Graham v. John Deere*, and certiorari should be granted to clarify the matter.[8] The *Graham v. John Deere* decision was decided on February 21, 1966,

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[8] *McCandless v. Furland*, 296 U.S. 140 and *Upshaw v. United States*, 335 U.S. 410.

while the original decision of the Tenth Circuit was March 17, 1965, and rehearing denied April 20, 1965.[9]

The original decision of the Tenth Circuit predates this Court's decision in *Graham v. John Deere*, and we call to this Court's attention that it may grant certiorari and reverse the judgment summarily on the authority of its own intervening decision.[10]

2. There is conflict between the Tenth Circuit and other Circuits which are following, as they should, the Supreme Court's edict in *Graham v. John Deere*. More particularly, the Eighth Circuit recognizes that the three tests required by the Supreme Court are its guidelines in determining obviousness or unobviousness[11] and the Eighth Circuit has followed the Supreme Court's ruling in the cases included in the following footnote.[12]

3. The Supreme Court assiduously reviewed the tests applied by the lower Courts, particularly the Fifth and Eighth Circuits, for the purpose of determining the effect of the 1952 Patent Act, which, for the first time, set forth its new statutory formulation on non-

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[9]Following denial of rehearing a Petition for Writ of Certiorari to the Supreme Court directed principally to anti-trust matters was filed; which proceedings were terminated on or about May 16, 1966.

[10]*Helvering v. Wiese*, 292 U.S. 614.

[11]*L & A Products, Inc. v. Britt Tech Corp.*, decided Aug. 29, 1966, ...F. 2d ...., 150 U.S.P.Q. 770 at 772.

[12]*American Infra-Red Radiant Co. v. Lambert Industries, Inc.* (C.A. 8, 1966), 360 F. 2d 977; *Kell-Dot Industries, Inc. v. Graves* (C.A. 8, 1966), 361 F. 2d 25; *Skee-Trainer, Inc. v. Garelick Mfg. Co.* (C.A. 8, 1966), 361 F. 2d 895; *Automated Building Components v. Hydro-Air Engineering* (C.A. 8, 1966), 362 F. 2d 989; *Piel Manufacturing Company v. George A. Rolfes Co.* (C.A. 8, 1966), 363 F. 2d 57. A review of published decisions indicates that the law laid down by the Supreme Court has been followed in recent decisions.

obviousness, stating "* * * In the title itself the Congress used the phrase 'Conditions for patentability: *non-obvious subject matter,*' thus focusing upon 'non-obviousness' rather than 'invention.' * * *". This Court's intent was to determine the meaning of the statutory provision and to lay down specific rules for the lower Courts and Patent Office to follow:

> "* * * We believe that strict observance of the requirements laid down here will result in that uniformity and definitiveness which Congress called for in the 1952 Act.
>
> "While we have focused attention on the appropriate standard to be applied by the courts, it must be remembered that the primary responsibility for sifting out unpatentable material lies in the Patent Office. * * * This is itself a compelling reason for the Commissioner to strictly adhere to the 1952 Act as interpreted here. This would we believe, not only expedite disposition but bring about a closer concurrence between administrative and judicial precedent."
>
> *Graham v. John Deere,* 383 U.S. 1, 15 L. Ed. 2d 545, 556-557.

4. The Tenth Circuit apparently refuses or neglects to follow the law this Court laid down in that in denying Petitioners' Motion its only decision consisted of the words "* * * are hereby denied.". Thus, the Tenth Circuit allowed its decision to stand on the basis of the new or better results test. The law of this Court should be uniform between the Circuits. There should not be a different law in one Circuit than another. which would have the effect of inducing forum shop-

ping, by guiding litigants toward or away from the Tenth Circuit because it applies a different test of invention than other Circuits.

All of the Trial Courts in the Tenth Circuit will rely upon the Tenth Circuit's decision in *Well Surveys, Incorporated, et al. v. McCullough Tool Company, et al.*, and, therefore, will be following the wrong law. Ultimately the Tenth Circuit must be straightened out and it is far better to do it now rather than wait for an accumulation of erroneous decisions.

5. The present case is of compelling importance because of the widespread public interest in the Swift patent.[13] There have been fifteen law suits filed in various parts of the county.[14] Only one of these suits has been tried, namely, the present one, and in this case the Judgment is erroneous because patentability was based on the wrong test. All other cases except *Well Surveys, Inc. v. Perfo-Log, Inc.*, Civil Action No. 9542, pending in the United States District Court for the Western District of Oklahoma, have been terminated by consent judgments or dismissals with the defendants taking licenses, or have been terminated by defendants going out of business.

Respondents, since the date of entry of the interlocutory judgment on March 16, 1961, have engaged

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[13]"It is * * * important to the public that competition should not be replaced by worthless patents * * *" *Pope Mfg. Co. v. Gormully*, 114 U.S. 224, 234, 36 L. Ed. 414, 418, 12 S. Ct. 632 (1892). Repeatedly, the Supreme Court has characterized the public interest in freedom from the strictures of the invalid patents as "dominant," "paramount," "transcendent" and the like.

[14]See Affidavit of R. Welton Whann attached to Motion as Exhibit 1, Appendix, p. 16-A).

in an oppressive industry-wide[15] program of misuse of its patents as established by the Affidavits attached to the Motion from which this Petition is filed (Appendix, p. 16-A).[16] Suits have been settled and licensees have been obtained by the threats of expensive litigation, and in a number of these cases well operators have yielded to taking licenses based on the representation that the patent has been held valid by the Tenth Cir-

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[15]That Respondents' illegal activities are nationwide is established by the following statement:

> "We did not directly threaten suit; however, we did state that it was the present policy of WSI to assert the WSI patents throughout the industry. That, in particular, the Swift Patent was believed to be almost universally used and we were asserting it wherever infringement was found. We said that in fairness to existing licensees it was our belief that it would be necessary that well logging operators either take a license or that we should sue them under the patents they infringe. Mr. Childs said that, in other words, we were going to require the radioactivity well logging operators to either assume the burden of paying royalty or the burden of the defense of a suit. We agreed that this is the substance of WSI's policy."

This statement is taken from a recently obtained Dresser Industries document, the entire document being attached hereto as Exhibit 2.

[16]In *Carbice Corporation of America v. American Patents Development Corporation, et al.*, 283 U.S. 420, the Supreme Court in a prior decision (283 U.S. 27) had not ruled on validity of the patent believing it unnecessary. *Carbice* petitioned the Court to rule on validity and the decision states:

> "* * * The reason assigned was the inauguration by the Dry Ice Corporation of a campaign of intimidation against customers of the Carbice Corporation by releasing to the public press a statement that the validity of the patent as sustained by the Court * * *" (283 U.S. 421)

The Supreme Court, upon rehearing, held the patent in suit invalid.

cuit.[17] As a part of Respondents' plan and program of controlling the entire industry, the Swift patent has been used for compelling payments of royalties on dual conductor arrangements which are outside the scope of the claims of the Swift patent.[18]

6. Because there is no well survey operator financially able to fight Respondents, it is unlikely that there will ever be litigation in any other Circuit carried far enough to reach the Supreme Court, and we, therefore, respectfully submit that since the decision below is clearly wrong this Court should grant certiorari under the policy laid down in *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50, and cases cited.

7. The Tenth Circuit is so clearly wrong in holding the Swift patent valid and is so clearly wrong in refusing to follow the *Graham v. John Deere* case that there should be a summary reversal or at the very least a remand with instructions to send the case to the Trial Court for the purpose of considering the three factual inquiries of the *Graham v. John Deere* case with respect to obviousness under 35 U.S.C. §103.

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[17]See Affidavits of William A. Snyder, William D. Witcraft, and Landon N. Roberts, attached to Motion as Exhibits 2, 3 and 4, respectively (Appendix, pp. 18-A, 21-A, 27-A).

[18]This is patent misuse under a host of authorities. See *Morton Salt Co. v. Suppiger*, 314 U.S. 488, *United States v. Masonite Corp.*, 316 U.S. 265, *Mercoid Corporation v. Mid-Continent Co.*, 320 U.S. 661, *American Securit Co. v. Shatterproof Glass Corp.*, 268 F. 2d 769, *B. B. Chemical Co. v. Ellis*, 314 U.S. 495.

In *Securities & Exchange Commission v. Otis & Co.*, 338 U.S. 843, this Court summarily reversed the Lower Court because the decision was so clearly erroneous as to make argument before the Court a waste of time.

Respectfully submitted,

R. WELTON WHANN,
Attorney for Petitioners.

Of Counsel:

EDWARD S. IRONS,

October 19, 1966.

May 29, 1951 L. M. SWIFT 2,554,844

CASING COLLAR LOCATOR

Filed March 22, 1946

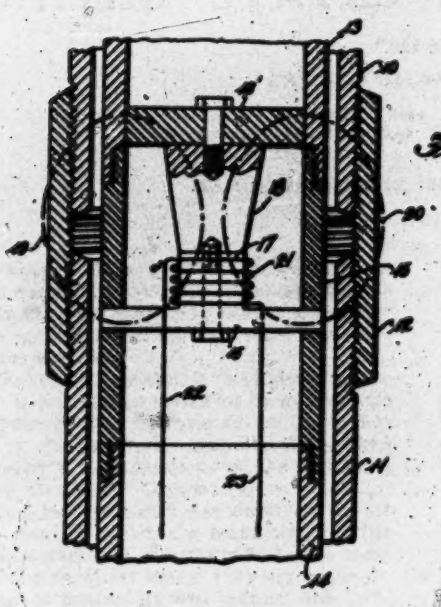


Fig. 1.

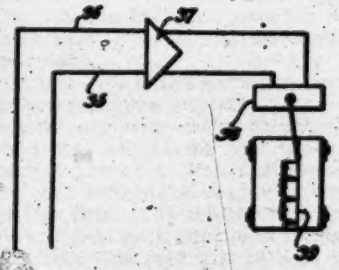


Fig. 3.



Fig. 2.

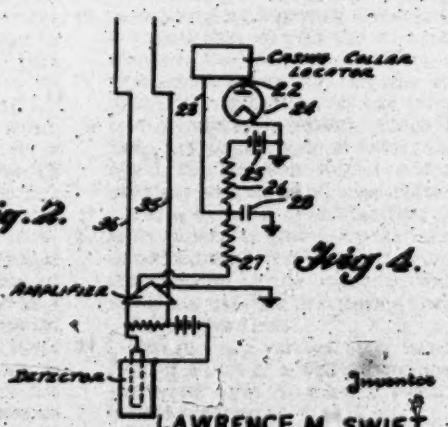


Fig. 4.

Inventor

LAWRENCE M. SWIFT

By James Y. Clarkson

Attorney

EXHIBIT 1.

Patented May 29, 1951 2,554,844

UNITED STATES PATENT OFFICE

2,554,844

CASING COLLAR LOCATOR

Lawrence M. Swift, Tulsa, Okla., assignor to Well Surveys, Incorporated, Tulsa, Okla., a corporation of Delaware

Application March 22, 1946, Serial No. 656,181

6 Claims. (Cl. 73—152)

1

This invention relates to the art of well logging and more especially to apparatus adapted to simultaneously log a well and record the position relative to the well log of markers fixed along the depth of the well bore.

The object of well logging is to obtain a series, preferably a continuous series, of measurements characteristic of the drillhole or of the strata surrounding the drillhole, and correlate these measurements with indications of the depths at which they are made. Ordinarily, the results of the well logging operation are obtained in the form of a chart in which the magnitudes of the various measurements are plotted against indications of the depth at which they are made.

In the usual process of well logging, the indications of depths are the result of measurements of the amount of cable paid out from the surface to the well logging instrument in the well bore. Experience has shown that such measurements are not always accurate. It is difficult to measure accurately the amount of cable paid out; the cable is inclined to stretch due to its own weight and the weight of the surveying instrument attached to its lower end; and at times the well logging instrument may bind to a greater or lesser degree in the drillhole. For all of these reasons it is desirable to accurately confirm the depth measurements obtained by measuring the amount of cable paid out.

In accordance with the present invention, it has been found that accurate indications of depths may be obtained, which may be used as a check against the measurements of the amount of cable paid out, or may be used instead of these measurements, if the well surveying device is so constructed that it not only performs the usual well surveying function, but also generates an appropriate signal each time that it passes one of a series of markers already placed at fixed depths in the well. Such markers are preferably the junctions between the sections of the well casing. Since well casing normally consists of standard lengths of pipe joined by steel collars, there occurs in the ordinary cased well a difference that can easily be detected at each junction between casing sections. This difference consists in a break in the casing wall and the additional band of steel comprising the collar, which surrounds the break and connects adjacent lengths of casing.

Under such conditions, if a magnetic field is created in the well bore and caused to be of such a configuration as to extend into the surrounding casing, and this field is lowered down the well bore, it will remain substantially unchanged except when it passes a junction between two casing sections. At that time, the break in the casing wall, or the surrounding band of steel comprising the collar, or both, will alter the configuration of the magnetic field to such an extent as to be easily detectable.

2

Along with a well surveying device which is to be lowered into a drillhole, it is a relatively simple matter to provide means for creating a magnetic field that will extend into the well casing and also to provide a detecting means that will detect any substantial change in the configuration of this field. The signal which results from the detection of such change in configuration of the magnetic field may then be used to determine or calibrate the depth scale against which the primary measurements are recorded.

According to the present invention this is accomplished by imposing a distinctive signal upon a circuit that carries the well logging measurements to the recorder at the top of the well and this signal causes the recorder itself to make a distinctive indication on the record each time a casing junction is passed. Since the casing junctions are passed only at intervals some distance apart, the resulting signal need not disturb the ordinary well log to an appreciable extent.

For a detailed understanding of the preferred embodiment of this invention and for a further understanding of its general principles, reference may be had to the appended drawings and the following detailed description thereof.

In the drawings:

Figure 1 is a vertical view, partly in cross-section, of a part of a well surveying device with the preferred form of marker locating means embodied therein;

Figure 2 is a circuit diagram illustrating the manner of connecting the marker locating means into the electrometer circuit of the well logging device;

Figure 3 is a circuit diagram of a recording circuit for use in conjunction with the electrometer circuit illustrated in Figure 2; and

Figure 4 is a diagrammatic illustration of the electrical system for the subsurface apparatus used in radioactivity well surveying, showing the instant invention and its relation thereto.

As shown in Figure 1, the usual cased well is lined with a series of casing sections, such as are indicated at 10 and 11, and adjacent casing sections are joined by casing collars, as illustrated at 12.

It is now common practice to explore cased

wells by lowering into them an exploring capsule suspended from a cable which extends from the surface. Such a capsule normally consists of an outer shell enclosing one or more electrical or electronic measuring devices, and whatever electrical circuits are necessary for transmitting the information obtained by the exploring device or devices, to the surface of the earth. The enclosing capsule is usually comprised of one or more sections of cylindrical steel casing closed at the ends and attached to the lower end of a supporting cable.

Two sections of such a casing are illustrated at 13 and 14, and normally these two sections would be screwed together to form a tight seal. In order to incorporate the principles of this invention in the well surveying instrument, however, an additional section of cylindrical casing 15 may be inserted between the original casing sections 13 and 14. This new section 15 is arranged to screw tightly in the place between the original sections and is of sufficient strength to withstand the pressures that are to be encountered, but is made of a non-magnetic material such, for example, as brass.

Mounted in the non-magnetic casing section 15 there is an annular pole piece 16 of a magnetic material. This pole piece 16 may be constructed to extend through the walls of the non-magnetic casing section 15 so that its outer periphery is flush with the outer wall of the casing. Pole piece 16 is connected to or made integral with a magnetic flux conductor 17 which extends upwardly and connects with a strong permanent magnet 18. The linking piece 17 lies between the pole piece 16 and the permanent magnet 18, and the permanent magnet 18 is positioned within the end of the adjacent casing section 13 which is of magnetic material.

The upper pole piece 18' of magnet 18 is also made annular in shape. By making both the upper pole of magnet 18 and the pole piece 16 annular in shape they will always contact the casing where no casing joints are located regardless of the orientation of the instrument in the well.

The permanent magnet, its linkage element and pole pieces may be secured together by screws as illustrated in Figure 1.

With such an arrangement of elements a magnetic circuit is established with the well casing as the instrument traverses the well. The circuit may be defined to include the magnet 18, its annular pole, a portion of the instrument housing 19, the well casing, annular pole piece 16, and linkage 17. The reluctance of this circuit will remain substantially constant when the instrument is travelling a section of well casing and as a result a substantially constant flux will flow in the magnetic circuit. However, when the instrument traverses a junction between adjacent sections of casing, the reluctance of the magnetic circuit is changed and as a result there will be a change in the magnetic flux flowing in the circuit. The change in reluctance is due to a change in the magnetic circuit which may be brought about in at least two ways.

One way in which a change in magnetic circuit occurs is by the additional metal in a casing collar. When the instrument is adjacent a casing collar, the new magnetic circuit includes the magnet 18, the annular pole piece, a portion of the instrument housing 19, casing section 14, casing collar 12, casing section 13, annular pole piece 16, and linkage 17. As the instrument traverses the casing junction, the reluctance of the magnetic circuit will vary, thereby producing a change in the magnetic flux flowing in the circuit. This change in flux may be detected by a coil 21 positioned about the pole piece 16. The change in the flux field that links the coil 21 will produce a voltage that will cause current to flow in an external circuit that is connected to conductors 22 and 23.

Another way in which the magnetic circuit can be changed is by making pole piece 16 thin relative to the length of the air gap between the ends of adjacent casing sections. With such an arrangement, when the pole piece 16 passes ends of adjacent sections of casing which are connected by a collar, an air gap is introduced in the magnetic circuit. This will greatly increase the reluctance of the circuit resulting in a decrease in the magnetic flux flowing in the circuit. This produces a change in the flux field linking coil 21 thereby producing a voltage that will cause a flow of current in an external circuit which is connected to the conductors 22 and 23.

As illustrated in Figures 2 and 4, the signal current carried from the coil 21 by the conductors 22 and 23 is used to impress on the output circuit of the well logging device, an appropriate signal indicative of the passing of a casing junction.

First, since the passing of a casing junction changes the magnetic field and then permits the magnetic field to return to its previous state, there results in the coil 21, a current first in one direction and then in the other. By connecting the conductor 22 to ground through a rectifier 24, the current in one direction is eliminated and the signal, which is to be used, is reduced to a single surge of current in one direction.

By properly connecting the conductor 23 to an element of one of the amplifier output tubes 30 of the well surveying circuit, this surge of current can be caused to momentarily alter the output of that tube to send a distinctive signal to the recording equipment at the surface of the earth.

It is preferred to accomplish this by furnishing the normal grid bias for the output amplifier tube 30 from a battery 25 connected in series with resistances 26 and 27 to the grid 29 of the amplifier tube 30. The conductor 23 is then connected to this circuit between the resistances 26 and 27 and a condenser 28 is connected between the conductor 23 and ground. Minor currents generated by reason of small variations in the well casing will not affect the action of the amplifier tube 30, but instead will pass through the condenser 28, the resistor 26 and the battery 25 to ground without any appreciable effect on the amplifier tube. However, by properly proportioning the condenser and resistances, the surge of current that occurs when a casing collar is passed will be sufficient to change the charge of the condenser to an appreciable extent. Until this charge on the condenser has leaked off through the resistor 26 and battery 25, the change in voltage will affect the grid 29 of the amplifier tube 30 and send to the surface the desired indication.

By properly arranging the polarity of the signals from the coil 21, that is, by causing the rectifier 24 to pass current in the proper direction, and properly proportioning the resistances 26 and 27 and the condenser 28, the surge of current that results from the passing of a casing junction can be caused to charge the condenser 28 so as to place an additional negative bias on the grid 29 when the casing junction is

passed. If the arrangement is such that this bias is sufficient, the bias can be made to completely stop the operation in the tube, thus making the output of the well logging circuit momentarily zero. This condition will continue for only so long a time as it takes the condenser to discharge through the resistor 28, probably not more than one-half to two seconds, and this interruption, when observed at the surface is an indication of the passing of a casing junction.

Numerous other arrangements may obviously be utilized for impressing an indication of each casing junction on the output of the well surveying device, but the one described has been found simple and practical.

In Figure 3, there is shown a simple form of a surface recorder which comprises input leads 36 and 36 connected to an amplifier 37, the output of which is connected to a recorder 38. As shown on the chart paper of the recorder, the pen of the recorder drops back to a zero line 39 each time a casing junction is passed.

To simplify the explanation of the present invention, its principles have been applied to a very simple type of well logging circuit. In practice, it has been found desirable to apply the same principles to a well logging circuit of the type described in the Scherbatskoy et al. Patent No. 2,349,225, granted May 16, 1944. In applying the principles to the circuit shown in the Scherbatskoy et al. patent, the grid 148 of the output amplifier 118' in Figure 7 of that patent, will be controlled by the circuit illustrated in Figure 2 of this application. On the surface, the output of both the phasing and the signal circuit will drop to zero when the output of the device of the well is interrupted and hence the meter 281 in the phasing circuit of Figure 12 will indicate the interruptions and can be arranged to record them on the well log. One expedient way to do this is to arrange for a second pen on the well logging recorder and to connect this second pen so that it will be operated when the output of the phasing circuit drops to zero. The second pen can thus place an indication on the chart independent of the well log. It is worth noting in connection with the application of the principles of this invention to the apparatus of the Scherbatskoy et al. patent, that since both the signal current and the phasing current drop to zero when a casing junction is passed, the position of the well logging recorder pen will not be affected but will simply remain constant during the short interruption in signals.

I claim:

1. Apparatus for logging cased wells that comprises means for detecting at a plurality of depths in a well bore phenomena characteristics of the surrounding strata by producing signals proportionally related to said phenomena, means for concomitantly establishing a magnetic field extending into the surrounding casing, means for detecting variations in said magnetic field due to junctions of the casing sections by producing an additional signal, means for combining said first signals and the additional signal, a recorder located at the surface of the earth, means for transmitting the resultant signals to the recorder for actuation of the same.

2. Apparatus for logging cased wells that comprises first detecting means for detecting at a plurality of depths in a well phenomena characteristic of the surrounding strata by producing signals proportionally related to said phenomena, means for producing with the casing of the well a magnetic circuit, means for energizing said magnetic circuit to produce a flow of flux therethrough, a second detecting means for detecting a change in the magnetic flux when the junction of adjacent casing sections form a part of the magnetic circuit by producing signals indicative thereof, means for introducing the last mentioned signals into the first detecting means to superimpose them on the signals characteristic of the phenomena being detected by said first detecting means, a recorder located at the surface of the earth, means for transmitting the resultant signals to the recorder for the operation of the same.

3. Apparatus for logging a cased well that comprises first detecting means for detecting at a plurality of depths phenomena characteristic of the surrounding strata by producing proportionally related signals, said means including means for amplifying said signals, means for transmitting the signals to the surface of the earth and a recorder located on the surface of the earth adapted to be actuated by the transmitted signals, second detecting means associated with said first detecting means for detecting the junctions between adjacent sections of casing whose depths are known, means operable by said second detecting means for altering the operation of said amplifying means when adjacent the junctions whereby the record of the recorder will indicate the location of the junctions relative to the phenomena being detected by said first detecting means.

4. Apparatus for logging a cased well that comprises first detecting means for detecting at a plurality of depths phenomena characteristic of the surrounding formations by producing proportionally related signals, means for traversing the well with said detecting means, said detecting means including electronic means which utilizes at least one thermionic tube for amplifying said signals, a recorder located at the surface, means for operating the recorder in coordination with the depth at which the detections are made, and means for transmitting the amplified signals to the recorder for the operation of the same, means associated with said first detecting instrument and adapted to move with the first detecting instrument for detecting the junctions of adjacent sections of casing when they are traversed by producing signals indicative of the junctions, means for impressing the last recited signals on an element of the thermionic tube of the amplifier forming a part of the detecting means to vary the operation of the amplifier when a junction is traversed, whereby the record of the recorder will indicate the location of the junctions relative to the phenomena being detected by said first detecting means.

5. In a system for logging cased wells having a capsule which is adapted to traverse the well and which contains means for producing a varying signal proportionally related in its magnitude of variation to a selected physical property of the surrounding strata, a recorder driven in correlation with the depth of the capsule, and means for transmitting the varying signal to the recorder for the operation of the same, the improvement which comprises means for detecting casing collars which are traversed by the capsule by producing signals indicative of their proximity, means for introducing said signals into the transmitting means of said system, whereby an indi-

cation of the casing collar signals will be produced on the record made by said recorder.

6. In a system for logging cased wells having a capsule which is adapted to traverse the well and which contains means for producing a varying signal proportionally related in its magnitude of variation to a selected physical property of the surrounding strata, a recorder driven in correlation with the depth of the capsule, and means for transmitting the varying signal to the recorder for the operation of the same, the improvement which comprises magnetic means for detecting casing collars which are traversed by the capsule by producing signals indicative of their proximity, means for introducing said signals into the transmitting means of said system, whereby an indication of the casing collar signals will be produced on the record made by said recorder.

LAWRENCE M. SWIFT.

REFERENCES CITED

The following references are of record in the file of this patent:

UNITED STATES PATENTS

Number	Name	Date
2,186,519	Walker	May 2, 1940
2,219,274	Scherbatskoy	Oct. 22, 1940
2,228,422	Ennis	Jan. 14, 1941
2,281,968	Vacquier	May 5, 1942
2,421,422	Kramow	June 3, 1947

EXHIBIT 2.

To: Files.
Date: July 14, 1961 Dresser Industries, Inc.
From: D. L. Sroufe Inter-Office Correspondence

Subject: WSI-Negotiations with Western Co.—Trip to Fort Worth July 13

Copy to: Jay Beaver
J. D. Mayson.

Jay Beaver and I went to Fort Worth Thursday, July 13, to discuss points in issue in the controversy with Western Company. We met with Mr. Childs, President, Walter Beadle, Executive Vice President, and J. S. Brown, Controller. The conference was devoted to a discussion of (a) accounting for past royalty under the existing license, (b) the unauthorized release of confidential information contained in field manuals and (c) infringement of Swift Patent and possibly other WSI patents.

With regard to the question of accounting, Mr. Brown explained in some detail their interpretation of the accounting provisions in the license and the procedure they have followed in reporting. He stated that if the procedure they have followed is erroneous, they will pay the correct amount. It was agreed that Jay Beaver would review the details of their procedure with Claude Hale and Bob Schumacher and let them know whether or not we still question their accounting. Offhand, their basis for accounting appeared to me .o be proper, but it is possible that another interpretation of the accounting provisions of the WSI agreement could lead to another result.

With regard to the unauthorized release of confidential information, we stated our position to the effect that the agreement we had had with them prevented the dissimilation of this information, further that the field manuals were clearly marked to show that they were property of Well Surveys and contained confidential information which was not to have been disclosed to anyone without permission of WSI. Mr. Childs seemed fairly hostile at this point. He refused to discuss why they had given the manuals to McCollough and asked if we were so mad about this that we were not willing to continue our discussion about a possible license. We told him that we were displeased, but that we were prepared to discuss the need for licenses for their infringing operations. He then said that he assumed we were merely stating our complaint to get it "on file" and that we could consider it was received in the spirit in which it was given.

We then discussed the question of patent infringement and stated that certain operations of Western Company, in our opinion, infringe the Swift Casing Collar Locator Patent. We said that under the interpretation of the claims of the Swift Patent by Judge Savage in the McCollough suit, we felt almost any Radioactivity Well Log using a Casing Collar Locator to correlate depth would be an infringement. We also mentioned the likelihood that they infringe our Calibrator Patent and the Norelius Neutron Logging Patent. Jay Beaver specifically mentioned the fact that we have been told that they copied the WSI design of its Neutron Calibrator. This was denied by Mr Clark and he stated that, in their opinion, they do not infringe our Calibrator Patent. We told them that there may be other patents which they are infringing,

but that we are not sufficicntly advised as to their equipment and operations to express an opinion at this time. It was suggested that Mr. Beaver give them a list of our patents, but they stated that they already have a list of our patents, and that they would again review our patent position—at least as to Swift and the patents we had mentioned.

We mentioned the Schlumberger Patents and Mr. Beaver said that it was quite likely that they would infringe the Krasnow Power Supply. At one point, Mr. Clark said that the patents of Schlumberger contained claims which are so broad that if they are valid, it would be almost impossible to avoid infringement. However, he indicated that, in his opinion, they could not be as broad as this. He said that Western Company has been, in effect, waiting for the air to clear in the litigation involving McCollough, PGAC and Dresser to determine who does have valid patents. This idea was further emphasized by Mr. Childs and he repeated several times the ground rules on which they would accept a license: (1) The Licensing Company must have a proven position in the field, (2) Licenses must have been accepted under the patents by other reputable service companies in the field. (3) The royalty rates are reasonable and other terms of the contract are not restrictive so as to put the Western Company at a competitive disadvantage. He said he would expect us to get all of the other logging companies to take licenses so that they would be paying the same royalty rate for the same type of service. We assured him that we are actively licensing the entire industry and that, in particular, we have recently asserted the Swift Patent and we told him that we

have licensed over thirty (30) companies to date. At this time they asked about PGAC and Welex and we told them that we are negotiating with both companies, and that the terms for a license agreement had been agreed upon in our negotiations with Welex. We also told them that the issue had been so drawn in our negotiations with PGAC that either PGAC would take a license under the Swift Patent or we would probably have no alternative but to bring the Swift Patent into the litigation with PGAC.

Mr. Childs told us that they have no intention of being unreasonable and that although they did not think we had any patent position a year ago, they realized that the decision in the McCollough suit and our licensing activities may have changed the picture. He said that they would have their Patent Lawyers review our license proposal and our patents, and if the conditions he had stated (quoted above) were met, they would take a license.

We left them a copy of the License Agreement for a 5% license under the Swift Patent and a copy of the 6% License Agreement for the full package, including Schlumberger patents for users of equipment other than WSI-designed equipment. Mr. Childs did ask if we were offering only the license under Swift or the "package" and we told him that we had not really discussed a package of patents with him. We explained that we had merely mentioned two patents in addition to the Swift Patent, which we thought that they might infringe. We told him that WSI has a great many patents and that it might well be that if they examine our patents they might find that other patents were needed. We told him that if this were the case, we

would be happy to discuss a license for them under any patents that they might need.

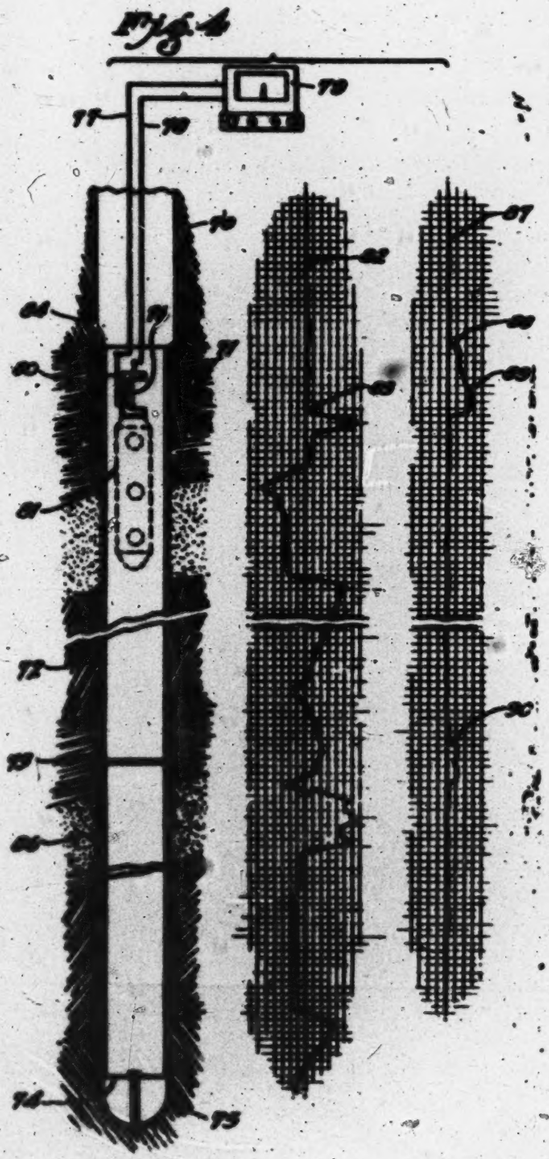
We did not directly threaten suit; however, we did state that it was the present policy of WSI to assert the WSI patents throughout the industry. That, in particular, the Swift Patent was believed to be almost universally used and we were asserting it whereve. infringement was found. We said that in fairness to existing licensees it was our belief that it would be necessary that well logging operators either take a license or that we should sue them under the patents they infringe. Mr. Childs said that, in other words, we were going to require the radioactivity well logging operators to either assume the burden of paying royalty or the burden of the defense of a suit. We agreed that this is the substance of WSI's policy.

DEL

DLS:pal

Ennis Patent
No. 2,228,623

Fig. 4



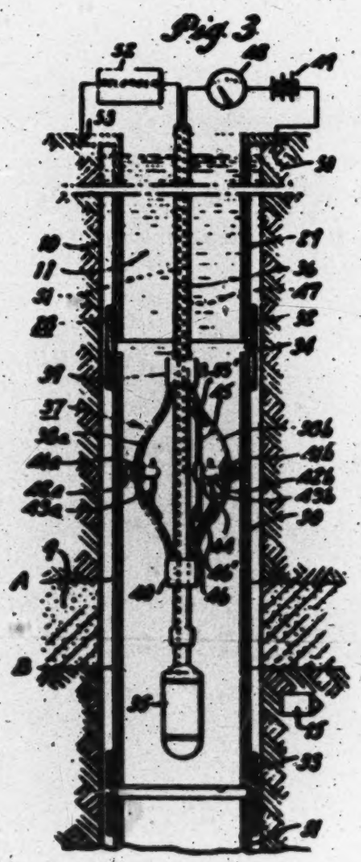
Doll Patent

No. 2,476,137

Fig. 2



Fig. 3



Castel Patent

No. 2,459,499

FIG. 1.

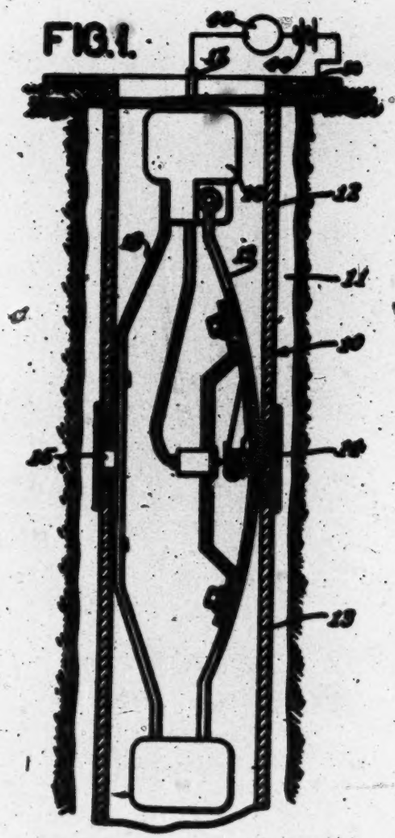
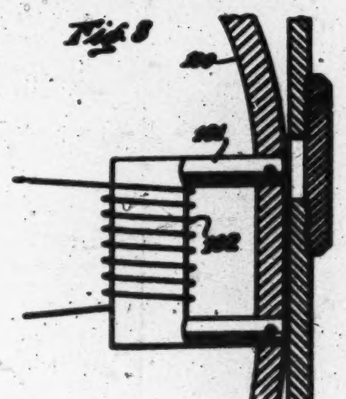
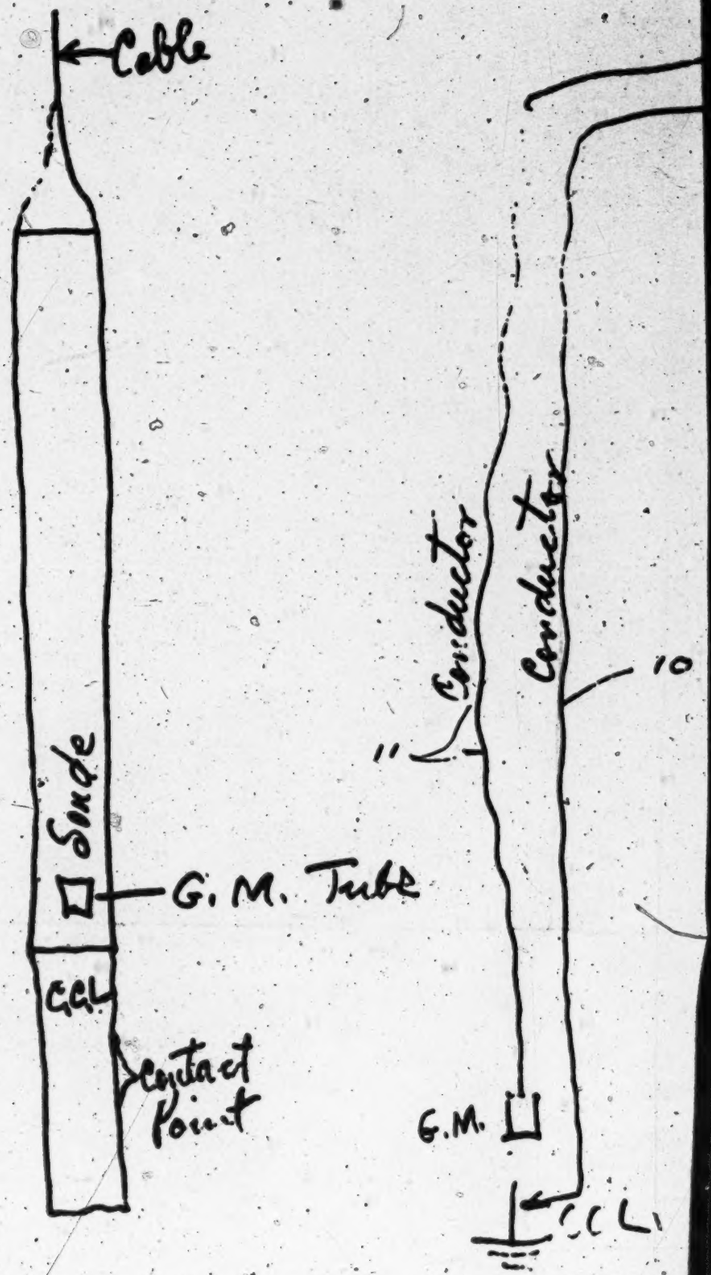


FIG. 8



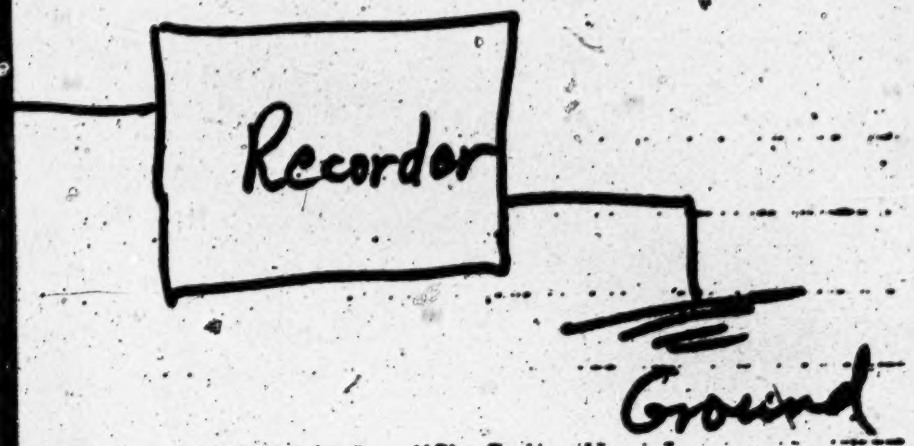
Schlumberger Prio

Ex. 227



Schlumberger Prior Public Use

Ex. 228



N. Tube

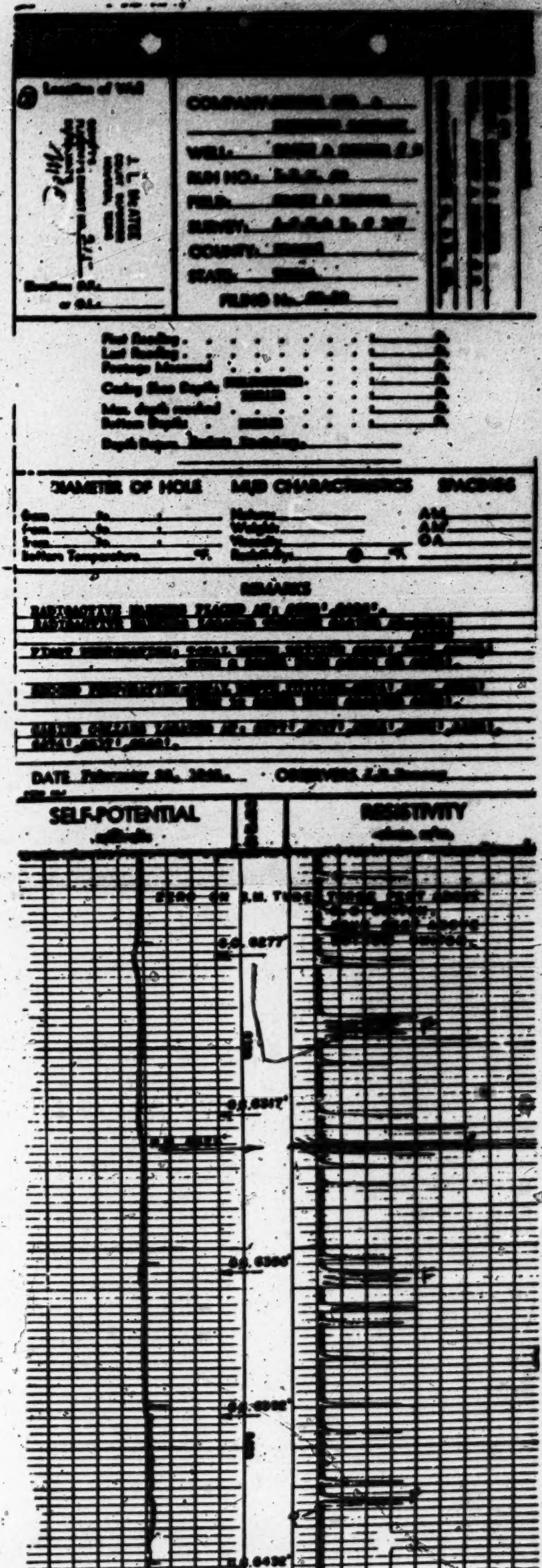
Caller Locator

J. L. McATEE
COURT REPORTER
HOUSTON, TEXAS

PLAINTIFF'S EXHIBIT NO. 228
DEFENDANT'S

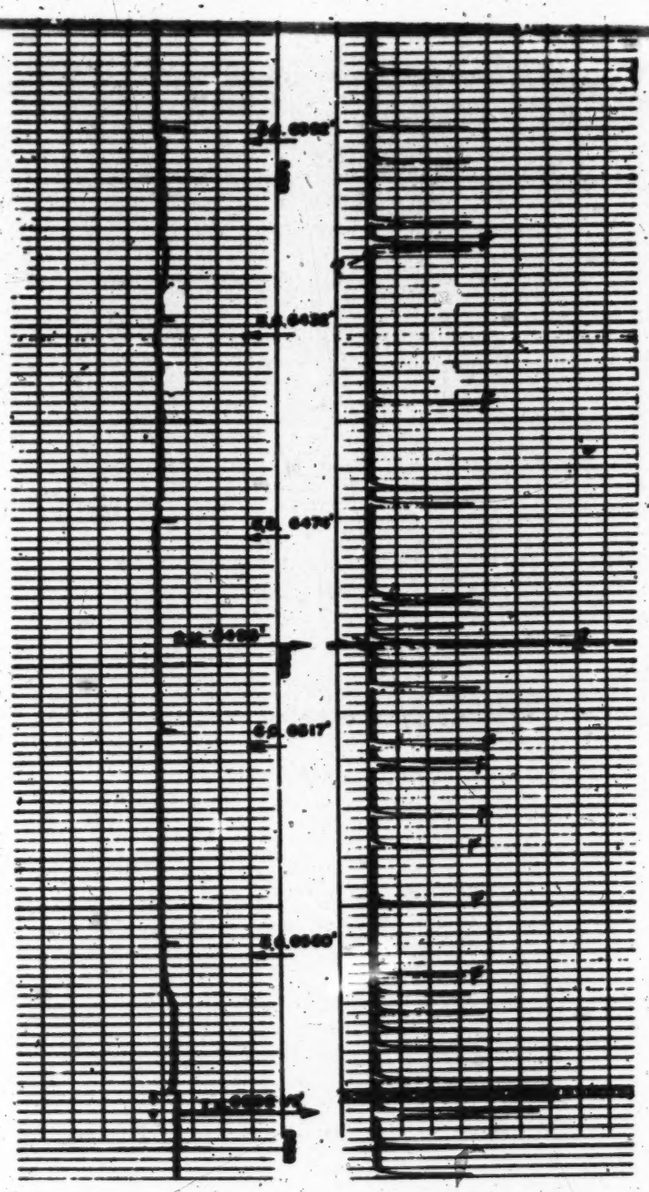
R E Cullough

Schlumberger Prior Public Use - Ex. 215



COVINGTON
PLAINTIFF'S EXHIBIT NO. 128
DEFENDANT'S

M E Cullough



SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 20 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 709

McCULLOUGH TOOL COMPANY, *et al.*,

Petitioners,

vs.

WELL SURVEYS, INCORPORATED, *et al.*,

Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

R. WELTON WHANN,
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Los Angeles, Calif. 90015,
Attorney for Petitioners.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Exhibit 2. Affidavit of William A. Snyder 18-A

Exhibit 3. Affidavit of William D. Witcraft ..21-A

Exhibit 4. Affidavit of Landon N. Roberts 27-A

Exhibit 5. Affidavit of Raymond F. Rathman ..32-A

Exhibit 6. Affidavit of Welton B. Whann 34-A

Judgment of the Court of Appeals for the Tenth Circuit 37-A

APPENDIX.

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

No. 6952

McCULLOUGH TOOL COMPANY, ROBERT W. PRINGLE, KENNETH I. ROULSTON, GEORGE M. BROWNELL, and PHILIP W. MARTIN,

Appellants,

vs.

WELL SURVEYS, INCORPORATED (by change of name now DRESSER SIE, INC.) and DRESSER INDUSTRIES, INC., a corporation,

Appellees.

No. 6953

McCULLOUGH TOOL COMPANY,

Appellant,

vs.

WELL SURVEYS, INC. (by change of name now DRESSER SIE, INC.),

Appellee.

Appeal From the United States District Court for the Northern District of Oklahoma.

Motion to Modify the Mandate of This Honorable Court to Permit the Filing in the Trial Court of a Motion to Vacate the Interlocutory Judgment Entered March 16, 1961 With Respect to Swift Patent No. 2,554,844, or, in the Alternative, to Consider This Motion as a Petition to Recall the Mandate of This Honorable Court and Treat This Motion as a Petition for Rehearing in This Court.

Appellant McCullough Tool Company hereby moves this Honorable Court as follows:

I.

To modify its Mandate to permit filing a Motion in the United States District Court for the Northern District of Oklahoma (copy of which accompanies this Motion) to vacate the interlocutory judgment entered March 16, 1961 with respect to the Swift Patent No. 2,554,844, and to hold said patent invalid and non-infringed, to dissolve the Injunction against McCullough Tool Company, and to permit the District Court to conduct such proceedings and take such action as it may consider appropriate;

or, in the alternative,

II.

To consider this Motion as a petition to recall the Mandate of this Honorable Court and treat this motion as a petition for rehearing in this Court to vacate the interlocutory judgment with respect to the Swift Patent No. 2,554,844, to hold said patent invalid and dissolve the Injunction against McCullough Tool Company.

This Motion is brought before this Court under the authority of *Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, which at page 91 states:

> "As the decree in question was entered pursuant to the mandate of an appellate court, proper deference to its authority required that a proceeding to reopen it, whether by rehearing or review, should be first referred to that tribunal. [Authorities cited.]"

This Motion is brought on the ground or basis that new facts of compelling force have occurred since this Court rendered its decision on the appeal from the Trial Court's interlocutory judgment. The new facts are that the Supreme Court of the United States, on February 21, 1966, decided a group of cases holding that the tests applied by this Court and also by the Trial Court were improper, erroneous tests of patentability, and laying down the proper test of patentability under 35 U.S.C. 103.

The test applied in this case by both the Trial Court and this Court is contrary and in direct conflict with the Supreme Court decisions.[1]

The issuance of this profound and far-reaching decision affecting so many decisions of so many courts and the public in general is an extraordinary and compelling circumstance and warrants the hearing and granting of this Motion or alternative Motion.

The Supreme Court cases referred to are *Graham et al. v. John Deere Company of Kansas City, et al.; Calmar, Inc., v. Cook Chemical Company; Colgate-Palmolive Company v. Cook Chemical Company,* .... U.S. ...., 15 L. Ed. 2d 545 and 148 U.S.P.Q. 459, and *United States v. Adams,* ...., U.S. ...., 15 L. Ed. 2d 572, and 148 U.S.P.Q. 479.

These decisions set down the law with respect to the legal test to be applied under Patent Statute 35 U.S.C. 103, and is a mandate or edict to Trial Courts and Courts of Appeal to strictly follow the rules and tests laid down by the Supreme Court in these decisions.

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[1]This statement is inserted here to provide the Court with a brief statement of grounds for rehearing under McCullough's alternative motion.

The specific grounds of this Motion are:

1. The test applied by the Trial Court and the Court of Appeals is not the correct test to determine patentability under 35 U.S.C. 103 and is contrary to and in conflict with the Supreme Court decision dated February 21, 1966, of *Graham, et al. v. John Deere Company of Kansas City, et al.; Calmar, Inc. v. Cook Chemical Company; Colgate-Palmolive Company v. Cook Chemical Company, supra.*

2. The Trial Court failed to make the following "basic factual inquiries" required by the Supreme Court cases of *Graham, et al. v. John Deere, et al., etc.*, which are:

a. A factual determination of "the scope and contents of the prior art";

b. A factual determination of the "differences between the prior art and the claims" of the Swift patent;

c. A factual determination of "the level of ordinary skill in the pertinent art".

3. The Trial Court failed to make Findings of Fact with respect to the factual inquires demanded by the above-referred to Supreme Court decisions as follows:

a. Findings of Fact as to "the scope and contents of the prior art";

b. Findings of Fact as to the "differences beveen the prior art and the claims" of the Swift patent;

c. Findings of Fact as to "the level of ordinary skill in the pertinent art".

and, therefore, there was no proper factual basis on which the Trial Court could reach its judgment and no proper basis on which the Court of Appeals could determine the basis on which the Trial Court reached its judgment.

McCullough Tool Company further moves this Honorable Court for an order requiring the Trial Court to fill a total vacancy in the Findings of Fact and to make Findings of Fact:

1. As to "the scope and contents of the prior art";

2. As to the "differences between the prior art and the claims" of the Swift patent; and

3. As to "the level of ordinary skill in the pertinent art".

If the factual determinations required by the Supreme Court are made this Court will reverse its decision as to Swift and hold it invalid.

Swift combined a magnetic casing collar locator and a standard type of radioactivity logging instrument, and sent signals over a single conductor for recording at the surface of the ground (all of these elements being old in the art, Finding 63 (R. 86), 199 Fed. Supp. 378). The Schlumberger public use employed the same combination of elements for simultaneously recording gamma ray and casing collar signals. Schlumberger employed a mechanical casing collar locator, which is the mechanical equivalent of Swift's magnetic collar locator. Schlumberger sent casing collar signals and radioactivity signals to the surface of the ground through either a single conductor in one instrument or two conductors in another instrument, for simultaneously re-

cording by separate pens. Schlumberger's Geiger counter detected the formations and its casing collar located the collars (R. 1048 and 1047).

The Bender Patent No. Re. 23,226 (Ex. 1a, R. 1100) taught that gamma rays could be detected in a cased well by a Geiger counter and that this information, when sent to the surface of the ground, would locate oil bearing formations.

Schlumberger taught that the Geiger counter and a casing collar could be combined for simultaneously recording formation signals and casing collar signals.

Ramsay recognized that the Geiger counter measured the radioactivity bullets and also detected natural gamma rays emitted from the formations.

Neither the Trial Court[2] nor the Court of Appeals considered, as they should have, whether the level of skill in the art was such that a person acquainted with the Schlumberger device would have been able to operate it in the same manner and for the same purpose as the Swift device. The Swift device does not function any differently than the Schlumberger device when it was recording formations and casing collars as shown in Exhibit 215, and all that Swift did was to use the Schlumberger combination to simultaneously record formations and casing collars in wells where no radioactive bullets had been installed. This different

[2]The Trial Court in this case at no time attributed to the Swift device any "unexpected", "operating characteristics" or "unusual and surprising consequences", nor was there a showing that "anyone", "noted expert" or "journeyman", ever expressed disbelief in the results of the operation of the Swift device, such as found by the Supreme Court in *United States v. Adams*, which is one of the decisions rendered by the Supreme Court on February 21, 1966.

yet analogous use of Schlumberger, when considered in conjunction with the Bender patent, the Doll patent, and the Castel patent, was obvious to a person of ordinary skill in the art, and, therefore, Swift is invalid under 35 U.S.C. 103.

If a person skilled in the art were, at the time of Swift's alleged invention, given the problem of simultaneously logging formations and locating casing collars, the prior art would have provided him with the answer.

For a complete discussion of the facts see the Memorandum accompanying this Motion, p. 20, Vol. II.

If the Court will make the three factual determinations required by the Supreme Court decisions of *Graham, et al. v. John Deere, et al.*, it will be compelled to conclude that the adding of a magnetic casing collar locator to the well-known radioactivity logging instrument was, at the time Swift did this, obvious to a person of ordinary skill in the art.

There are extraordinary and compelling circumstances which require this Court to grant appellant's Motion or alternative Motion:

1. All of the public who deal in petroleum products is affected. The Swift patent involved in this litigation has been licensed to substantially the entire well drilling industry which pays royalties to Dresser Industries.

2. There have been sixteen law suits filed for infringement of the Swift patent in different parts of the country. Only one of these suits has been tried, namely, the present one, and in this case the judgment is erroneous because it is based on the wrong test which has been struck down by the Supreme Court.

All of the other cases, except Well Surveys, Inc. v. Perfo-Log, Inc., Western District of Oklahoma, have been terminated by Consent Judgment or dismissed, with defendants taking a license or going out of business (See Memorandum accompanying this Motion, p. 11, Vol. II). In a number of instances the industry has yielded to taking a license or immunity agreement based on representations that the patent has been held valid in this Tenth Circuit. (See Memorandum accompanying this Motion, p. 11, Vol. II).

3. Dresser, following the interlocutory judgment in this case misrepresented the scope of the claims of Swift, and forced small operators to sign immunity agreements on the basis that Swift claims covered separate cables for separately carrying casing collar signals and radioactivity signals to the surface of the ground, whereas the Trial Court and Court of Appeals had *already adjudicated* that claims are limited to combining signals and sending signals to the surface of the ground over a single cable. (See Memorandum accompanying this Motion, p. 11, Vol. II).

4. Patents are of paramount public interest and the public at large will suffer if the present decision of validity of the Swift patent is allowed to stand. (See Memorandum accompanying this Motion, p. 8, Vol. II).

This Court has the inherent plenary power to vacate its erroneous interlocutory judgment. Where an interlocutory judgment is involved a rehearing may be sought at any time before final judgment provided due dili-

gence be employed and a revision be otherwise consonant with equity. (*Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 90, 91).

It is our position that:

1. The decision of this Court is interlocutory and does not become final "until the conclusion of the accounting";

2. This Court has the "power at any time prior to the entry of its final judgment at the close of the accounting to reconsider any portion of its decision and to reopen any part of the case"; and

3. This Court is "free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to [remand and] reopen the case for further evidence."

Our position is substantiated by the following quotation from *Marconi Wireless Co. v. U.S.*, 320 U.S. 1, 47, 48;

> "Although the interlocutory decision of the Court of Claims on the question of validity and infringement was appealable, *United States v. Esnault-Pelterie*, 299 U.S. 201, 303 U.S. 26; 28 U.S.C. §288(b), as are interlocutory orders of district courts in suits to enjoin infringement, 28 U.S.C. §227(a); *Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 89, the decision was not final until the conclusion of the accounting. *Barnard v. Gibson*, 7 How. 649; *Humiston v. Stainthorp*, 2 Wall. 106; *Simmons Co. v. Grier Bros. Co., supra*, 89. Hence the court did not lack power at any time prior to entry of its final judgment at the

close of the accounting to reconsider any portion of its decision and reopen any part of the case. *Perkins v. Fourniquet*, 6 How. 206, 208; *McGourkey v. Toledo & Ohio Central Ry. Co.*, 146 U.S. 536, 544; *Simmons Co. v. Grier Bros. Co., supra*, 90-91. It was free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the case for further evidence."

The Motion was timely made. Following this Court's decision on March 17, 1961 [65] (343 F. 2d 381), appellant filed a Petition for Rehearing which was denied and this was followed by a Petition for Writ of Certiorari before the Supreme Court. On February 21, 1966, the Supreme Court decided the *Graham, et al. v. John Deere, et al.* cases, whereafter McCullough Tool Company prepared and filed this Motion (See Memorandum accompanying this Motion, p. 14, Vol. II).

At the hearing of this Motion the party McCullough Tool Company will rely upon all papers and pleadings on file herein, the attached Affidavits and Points and Authorities, Memorandum and the accompanying Motion for the District Court.

Dated: July 15, 1966.

R. WELTON WHANN,
ROBERT M. MCMANIGAL,
RICHARD B. MCDERMOTT,
By R. WELTON WHANN,
Attorneys for Appellant McCullough Tool Company.

MEMORANDUM OF POINTS AND AUTHORITIES.

I.

On motion and upon such terms as are just, the Court may relieve a party from an interlocutory judgment, order, or injunction.

Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 89.

Marconi Wireless Co. v. United States, 329 U.S. 1, 47, 48, in which the Court held:

"Although the interlocutory decision of the Court of Claims on the question of validity and infringement was appealable, *United States v. Esnault-Pelterie*, 299 U.S. 201, 303 U.S. 26; 28 U.S.C. §288(b), as are interlocutory orders if district courts in suits to enjoin infringement, 28 U.S.C. §227(a); *Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 89, the decision was not final until the conclusion of the accounting. *Barnard v. Gibson*, 7 How. 649; *Humiston v. Stainthorp*, 2 Wall. 106; *Simmons Co. v. Grier Bros. Co., supra*, 89. Hence the court did not lack power at any time prior to entry of its final judgment at the close of the accounting to reconsider any portion of its decision and reopen any part of the case. *Perkins v. Fourniquet*, 6 How. 206, 208; *McGourkey v. Toledo & Ohio Central Ry. Co.*, 146 U.S. 536, 544; *Simmons Co. v. Grier Bros. Co., supra*, 90-91. It was free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the cause for further evidence."

II.

While the applicable law is somewhat similar to the provisions of Rule 60(b) of the Federal Rules of Civil Procedure, this Motion is not made under that Rule, since Rule 60(b) is expressly limited to "final" judgments, orders or proceedings.

Federal Rules of Civil Procedure, Rule 60(b).

III.

Relief from an interlocutory judgment may be sought and granted after an appeal and after Mandate to the Trial Court.

Sun Oil Co. v. Burford, 130 F. 2d 10, 13 (C.A. 5, 1942) in whicch the Court held at page 13:

> "Our rules do not contemplate a second petition for rehearing, but this one was allowed to be filed because of an alleged conflict within the circuit of decisions rendered by this court at this term. Although the mandate in this case has been sent down, there is no reason why it may not be recalled by the court during the same term to prevent injustice."

Bros Incorporated v. W. E. Grace Manufacturing Company (C.A. 5, 1963), 320 F. 2d 594.

IV.

A Court has the plenary power to grant relief against interlocutory judgments where enforcing the judgment would be contrary to justice, because of matters arising subsequent to the rendition of the judgment.

Sun Oil Co. v. Burford (C.A. 5, 1942), 130 F. 2d 10, 13;

Oliver v. City of Shattuck (C.A. 10, 1946, Circuit Judge Murrah speaking for the Court), 157 F. 2d 150, 152 and 153.

V.

A decision in a patent case which adjudicates validity and infringement, orders the issuance of injunction, and is final except for the accounting, is an interlocutory judgment.

Title 28 U.S.C., Paragraph 1292(4);

Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 89;

Marconi Wireless Co. v. United States, 120 U.S. 1, 47.

VI.

It is the duty of every Court to determine patent validity by carefully examining 35 U.S.C. 103 and determine the scope and content of the prior art, the difference between the prior art, and the claims at issue, and the level of ordinary skill in the pertinent art. Matter of obviousness or nonobviousness must be determined against this threefold factual background.

Graham, et al. v. John Deere Company of Kansas City et al.; Calmar, Inc. v. Cook Chemical Company; Colgate-Palmolive Company v. Cook Chemical Company, ... U.S. ....., 15 L. Ed. 2d 545, 148 U.S.P.Q. 459.

VII.

Where validity of a patent is involved public interest in a governmentally bestowed monopoly is of transcendent importance and the subject matter is of such great public interest and exceptional and compelling circumstances warrant rehearing under equitable principles.

"Another factor, perhaps of even greater importance, is the nature of this litigation. The issue is the validity of a patent. The public interest in a governmentally bestowed monopoly is of transcendent importance. This led us to an extraordinary action fifteen years ago when, in response to a petition for rehearing after the announcement of our earlier opinion, we suspended our mandate and referred back to the District Court a part of the case for further evidence and findings. Zachos v. Sherman-Williams Co., 5 Cir., 1948, 166 F.2d 79, and after recertification, 177 F.2d 762. There we pointed out 'A patent is a monopoly granted by the public and is of public interest, and ought to exist against all or none.' * * *"

Bros Incorporated v. W. E. Grace Manufacturing Company, 320 F.2d 594, 609, 610 (C.A. 5, 1963)

"* * * The public is a silent but an important and interested party in all patent litigation, and is entitled to protection against the monopolization of what is not lawfully patentable. Rota-Carb Corporation v. Frye Manufacturing Company, 8 Cir., 313 F.2d 433, 444 (1963). * * *"

John Deere & Co. v. Graham, 333 F.2d 529, 535 (C.A. 8, 1965).

"* * * The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize

the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored. * * *"

Graham v. John Deere & Co., ... U.S. ...., 15 L.Ed. 2d 550, 148 U.S.P.Q. 459.

Certificate of Counsel.

It is hereby certified in our judgment the foregoing Motion is well founded and is not interposed for delay.

R. WELTON WHANN,
315 West Ninth Street,
Los Angeles 15, California,
Attorney for Appellants.

Los Angeles, California, July 15, 1966.

Exhibit 1.

AFFIDAVIT OF R. WELTON WHANN

State of California County of Los Angeles ss.

R. Welton Whann, being first duly sworn, deposes and says:

That he is an attorney at law and is an attorney for the McCullough Tool Company in this litigation.

That affiant is informed and believes that the Swift Patent No. 2, 554,844 has been involved in the following litigation, in addition to the present suit:

Title	Where Filed	Filing Date	Disposition of Suit
Well Surveys, Inc. v. Welex, Inc.; Welex Jet Services, Inc.; and Halliburton Co.	Northern District Oklahoma (Tulsa) No. 5145	Mar. 20, 1961	Dismissed
Well Surveys, Inc. v. Black Gold Logging & Perforating, Inc.	Northern District Oklahoma (Tulsa) No. 5310	Dec. 12, 1961	Dismissed
Well Surveys, Inc. v. Perfo-Log, Inc.	Western District Oklahoma No. 9542	Dec. 26, 1961	Pending
Well Surveys, Inc. v. Comet Guns, Inc.	Eastern District Oklahoma (Muskogee) No. 5097	Dec. 29, 1961	Default Judgment
Well Surveys, Inc. v. Tech. Eng. Petroleum Service Co., Inc.	Southern District Texas (Houston) No. 14,264	Apr. 11, 1962	Dismissed
Well Surveys, Inc. v. Go Services, Inc.	Northern District Texas (Abilene) No. 2115	June 14, 1962	Consent Judgment
Well Surveys, Inc. v. Trainer Surveys, Inc.	Western District Louisiana (Shreveport) No. 8880	June 14, 1962	Dismissed
Well Surveys, Inc. v. Subsurface Completion Services, Inc.	Eastern District Louisiana (New Orleans) No. 12,510	Aug. 6, 1962	Dismissed

Title	Where Filed	Filing Date	Disposition of Suit
Well Surveys, Inc. v. Guns, Inc.; E. A. Owens and Leon Pyle	Western District Louisiana (Shreveport) No. 9237-S	Dec. 26, 1962	Final Judgment Dismissed
Well Surveys, Inc. v. Great Guns, Inc.	District Kansas (Wichita) No. W-2767	Jan. 4, 1963	Final Judgment
Well Surveys, Inc. v. Eastern Wire Line Services, Inc.	Western District Louisiana (Lafayette) No. 9259-L	Jan. 9, 1963	Dismissed
Well Surveys, Inc. v. R. C. Bennett dba Prairie Service Co.	Western District Texas (Pecos) No. 3711	Apr. 23, 1963	Consent Judgment
Well Surveys, Inc. v. Go Electronics Surveys, Inc.	Northern District West Virginia (Wheeling) No. 1225-W	May 24, 1963	Dismissed
Dresser Industries, Inc. v. Raymond F. Rathman dba Mike Rathman Logging Co.	Northern District Texas (Dallas) No. 7-74	May 14, 1964	Consent Decree
Dresser Industries, Inc. v. Texas Perforating Co.	Northern District Texas (Wichita Falls) No. 7-95	Sept. 21, 1964	Dismissed

That upon information and belief the records of the Clerks of the various Courts show that all have been terminated by consent judgment or dismissed, except the present suit, and the suit of Well Surveys, Inc. v. Perfo-Log, Inc., which is still pending.

Affiant alleges, on information and belief, that ninety to one hundred licenses or immunity agreements have been granted under said Swift patent.

/s/ R. Welton Whann
R. Welton Whann

Subscribed and sworn to before me this 14th day of July, 1966.

/s/ Claire LaBrash
Notary Public in and for the County of Los Angeles, State of California

My commission expires April 7, 1969.

Exhibit 2.

AFFIDAVIT OF WILLIAM A. SNYDER.

State of Kansas
County of Barton

William A. Snyder, being first duly sworn, deposes and says:

From January 1960 to spring of 1964, I was President of Perforators, Incorporated, which is a Kansas corporation.

From January 1960 to spring of 1964, the business of Perforators, Incorporated was to make radioactivity type surveys in open and cased holes, set bridging plugs in cased holes, and perform jet perforating in cased holes.

Sometime in September of 1962, Perforators, Incorporated entered into an immunity agreement with Well Surveys, Inc. under the Swift Patent No. 2,554,844 and the Mardock Patent No. 2,810,076 which was effective as of July 1, 1962.

Sometime in August of 1962, there was a meeting between affiant, William D. Witcraft, Vice President of Perforators, Incorporated, Marvin Thompson, attorney for Perforators, Incorporated, Howard McCoy, Secretary and Treasurer for Perforators, Incorporated, and Jay G. Beaver of Well Surveys, Inc. at the office of Marvin Thompson, which is 525 Main Street, Russell, Kansas. While discussing the immunity agreements between Perforators, Incorporated and Well Surveys, Inc., Mr. Beaver stated that Perforators, Incorporated would have to pay a 5% royalty on the service charge and a 5% royalty on the Gamma Ray logging charge. The service charge is a charge of $150.00 made for transporting the equipment to the well and

setting up the equipment for operating. Either affiant, Mr. Witcraft, or Mr. Thompson said to Mr. Beaver that Perforators, Incorporated should not have to pay a royalty on the service charge because the services which are the basis of the service charge are a separate operation from the making of a Gamma Ray log. As a comparison, it was agreed between Perforators, Incorporated and Well Surveys, Inc. that a 5% royalty would be paid on $50.00 of the service charge instead of the entire $150.00 service charge.

Sometime before the meeting in Mr. Thompson's office in August of 1962, Mr. Beaver told Mr. Witcraft and me that in the Well Surveys, Inc. versus McCullough Tool Company lawsuit, the Swift Patent No. 2,554,844 was held to be valid and infringed. Mr. Beaver led me to believe that the Well Surveys, Inc. versus McCullough Tool Company lawsuit was all done. As a result of this, Mr. Witcraft and I decided that it would be wise for Perforators, Incorporated to take a license under the Swift Patent.

Sometime in July, August, or September of 1962, I told Mr. Beaver that to avoid infringement of the Swift Patent No. 2,554,844, I would change Perforators, Incorporated's Gamma Ray tools so that they would send the Gamma Ray signals up one conductor and the casing collar signals up two conductors which are separate and distinct from the conductor up which the Gamma Ray signals are sent. Mr. Beaver told me that Gamma Ray logs made by multi-conductor Gamma Ray tools are covered by the Swift Patent No. 2,554,844 and that Perforators, Incorporated would not avoid infringing the Swift Patent by making the change I suggested. Because of my reliance upon

Mr. Beaver's statement, Perforators, Incorporated entered into the July 1, 1962 immunity agreement with Well Surveys, Inc., instead of changing its Gamma Ray tools to multi-conductor Gamma Ray tools.

From July 1, 1962, the effective date of the Perforators, Incorporated and Well Surveys, Inc. immunity agreement, to spring of 1964, Perforators, Incorporated paid a 5% royalty on $50.00 of the $150.00 service charge as well as a 5% royalty on the Gamma Ray logging charge, or $10.00, whichever is greater.

I have read the foregoing statements and they are true according to my personal knowledge.

/s/ William A. Snyder
WILLIAM A. SNYDER

State of Kansas
County of Barton

Subscribed to and sworn to before me on this 2nd day of June 1966.

LEALIA OPAL WEBSTER
Notary Public in and For the County of Barton, State of Kansas.

My commission expires June 13, 1966.

Exhibit 3.

AFFIDAVIT OF WILLIAM D. WITCRAFT

State of Kansas
County of Barton

William D. Witcraft, being first duly sworn, deposes and says:

I am President of Perforators, Incorporated.

From January 1, 1960 to spring of 1964, I was Vice President of Perforators, Incorporated and have been President since spring of 1964.

The business of Perforators, Incorporated is to make radioactivity type surveys in open and cased holes, set bridging plugs in cased holes, and perform perforating in cased holes. Perforators, Incorporated has never made a radioactivity tracer log.

Sometime in September of 1962, Perforators, Incorporated entered into an immunity agreement with Well Surveys, Inc. under the Swift Patent No. 2,554,844 and the Mardock Patent No. 2,810,076 which was effective as of July 1, 1962.

Sometime in August of 1962, there was a meeting between affiant, William Snyder, President of Perforators, Incorporated, Marvin Thompson, attorney for Perforators, Incorporated, Howard McCoy, Secretary and Treasurer for Perforators, Incorporated, and Jay G. Beaver of Well Surveys, Inc. at the office of Marvin Thompson, which is 525 Main Street, Russell, Kansas. While discussing the immunity agreements between Perforators, Incorporated and Well Surveys, Inc., Mr. Beaver stated that Perforators, Incorporated would have to pay a 5% royalty on the service charge and 5%

royalty on the Gamma Ray logging charge. The service charge is a charge of $150.00 made for transporting the equipment to the well and setting up the equipment for operating. Either affiant, Mr. Snyder, or Mr. Thompson said to Mr. Beaver that Perforators, Incorporated should not have to pay a royalty on the service charge because the services which are the basis of the service charge are a separate operation from the making of a Gamma Ray log. As a compromise, it was agreed between Perforators, Incorporated and Well Surveys, Inc. that a 5% royalty would be paid on $50.00 of the service charge instead of the entire $150.00 service charge. This agreement is set forth in the third paragraph of the letter from Mr. Beaver to Mr. Thompson, dated August 28, 1962, attached as Exhibit A.

Sometime before the meeting in Mr. Thompson's office in August of 1962, Mr. Beaver told Mr. Snyder and me that in the Well Surveys, Inc. versus McCullough Tool Company lawsuit, the Swift Patent No. 2,554,844 was held to be valid and infringed. Mr. Beaver led me to believe that the Well Surveys, Inc. versus McCullough Tool Company lawsuit was finished. As a result of this, Mr. Synder and I decided that it would be wise for Perforators, Incorporated to take a license under the Swift Patent, and therefore the immunity agreement, which is effective as of July 1, 1962, was entered into between Perforators, Incorporated and Well Surveys, Inc.

From July 1, 1962, the effective date of the Perforators, Incorporated and Well Surveys, Inc. immunity agreement, to the present date, Perforators, Incorporated has paid a 5% royalty on $50.00 of the $150.00

service charge as well as a 5% royalty on the Gamma Ray logging charge, or $10.00, whichever is greater. Attached as Exhibit B is a royalty report for the month of May 1964, which is a typical monthly royalty report submitted by Perforators, Incorporated to Well Surveys, Inc. and to which the royalty check as payment is attached. In Exhibit B, the fourth column from the left, which is headed "Additional Charge," is actually the service charge. The $50.00 figures under the column headed "Additional Charge" are the $50.00 portions of the $150.00 service charges upon which a 5% royalty is paid.

When Perforators, Incorporated runs a combination Gamma Ray, neutron and casing collar log, it pays a 5% royalty on the entire charge for the Gamma Ray, neutron, and casing collar log, and not merely 5% royalty on the Gamma Ray and casing collar log *or* neutron and casing collar log.

Attached as Exhibit C is a letter from Dresser Industries, Inc. received by affiant on or about May 7, 1965.

I have read the foregoing statements and they are true according to my personal knowledge.

/s/ William D. Witcraft
WILLIAM D. WITCRAFT

State of Kansas
County of Barton

Subscribed to and sworn to before me on this 2nd day of June 1966.

LEALIA OPAL WEBSTER
Notary Public in and For the County
of Barton, State of Kansas

My commission expires June 13, 1966.

Exhibit A.

WELL SURVEYS INC.

P. O. Box 1799 Houston 1, Texas

August 28, 1962

Mr. Marvin E. Thompson
Holland, Thompson & Holland
525 Main Street
Russell, Kansas

Re: Perforators, Inc.

Dear Mr. Thompson:

Attached are two copies of the Immunity Agreement covering Perforators, Inc. operations under the Swift and Mardock patents. Both copies of the Immunity Agreement have been completed and require signatures of the appropriate officials of the Company. Upon execution by Perforators, Inc., please return both copies to WSI for execution.

Attached also is supplement specifying the conditions of the Agreement in event that the Swift patent is held invalid.

As agreed during our meeting, the effective date of the license is to be July 1, 1962. The royalties will be due from this date forward. Royalties computed in accordance with Paragraph III shall distribute $50.00 of the service charge to the radioactivity logging operation involved.

We hope those conditions are satisfactory and shall expect to hear from you at an early date.

Yours very truly,

/s/ Jay G. Beaver
JAY G. BEAVER
Vice President

Attachments

cc: Perforators, Inc.
Post Office Box 811
Great Bend, Kansas

Exhibit B.

ROYALTY REPORT TO WELLS SURVEY, INC.

Company Perforating, Inc.

Month of May, 1964

Invoice Date	Invoice Number	Logging Charge	Additional Charge	Combination Charge	Royalty Basis	Royalty Due
5/6	796	150.00	50.00	200.00	200.00	10.00
5/15	797	150.00	50.00	200.00	200.00	10.00
5/19	798	200.00	50.00	750.00	250.00	12.50
5/4	919	263.00	50.00	313.00	313.00	15.65
5/4	920	75.00	50.00	125.00	125.00	10.00
5/4	921	75.00	50.00	125.00	125.00	10.00
5/22	923	150.00	50.00	200.00	200.00	10.00
5/23	924	150.00	50.00	200.00	200.00	10.00
5/25	925	150.00	50.00	200.00	200.00	10.00
						$98.15

Exhibit C.

DRESSER INDUSTRIES, INC.
Oil, Gas, and Chemical Equipment
Post Office Box 589
Houston, Texas 77001

May 7, 1965

TO LICENSEES UNDER PATENTS OWNED BY DRESSER INDUSTRIES, INC.

As a licensee of Dresser Industries, Inc. in the field of radioactivity well logging, you are probably aware of our pending litigation with McCullough Tool Company. The United States Court of Appeals for the Tenth Circuit, in an opinion issued March 17, 1965, has affirmed in all respects the opinion of the District Court which held, among other things, that U. S. Patent 2,544,844 to L. M. Swift, under which you are licensed, is valid and has been infringed by McCullough. The Court of Appeals also affirmed the District Court in holding that this patent is not being misused and is, therefore, enforceable against infringers.

The Opinion of the Court of Appeals has been published in the U. S. Patent Quarterly, Vol. 145, page 6, which is the advance sheet of April 5, 1965. The Opinion will also undoubtedly be carried in other legal reports. Since the Opinion is quite long we are not automatically sending copies to all of our licensees; however, if you would like a copy of the Opinion, please let me know and I will send one to you.

Yours very truly,

/s/ Jay G. Beaver
Jay G. Beaver
Manager of Patent Licensing

JGB/gc

Exhibit 4.

AFFIDAVIT OF LANDON N. ROBERTS

State of Texas
County of Wichita

Landon N. Roberts, being first duly sworn, deposes and says:

I am in the business of making Tracer Surveys, Gamma Ray Surveys, and Caliper Logs and have been in the business since October of 1961.

I do business under the fictitious name of Roberts Wireline Service Company.

I purchased all of my equipment from Radiation Engineering and Manufacturing Company.

I own and operate two Gamma Ray tools. I purchased the 3⅛" Gamma Ray tool sometime around October of 1961, and the 1¾" Gamma Ray tool sometime around October of 1962.

Sometime in April of 1962, Mr. Jay G. Beaver of Well Surveys, Inc. told me to take a license under the Swift Patent No. 2,554,844.

I did not answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Sometime in June of 1962, Mr. Beaver again told me to take a license under the Swift Patent.

Again I did not answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

Sometime in September of 1962, Mr. Beaver again told me to take a license under the Swift Patent.

Again I did not answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Again I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

Sometime in January of 1963, Mr. Beaver again told me to take a license under the Swift Patent.

Again I did not answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Again I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

Sometimes in June of 1963, Mr. Beaver again told me to take a license under the Swift Patent.

Again I did not answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Again I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

Sometime in July of 1963, Mr. Beaver again told me to take a license under the Swift Patent.

Again I didn't answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Again I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

By letter dated February 19, 1964, Mr. Beaver again told me to take a license under the Swift Patent stating, "This matter has been pending for sometime and we feel the negotiations must be concluded without further delay. Please be prepared to do so during my forthcoming visit."

Again I didn't answer Mr. Beaver and evaded him during his visit. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Again I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

By letter dated May 7, 1965, Mr. Beaver inferred that Dresser Industries, Inc. would sue me if I didn't take a license under the Swift Patent. In that letter Mr. Beaver said: "The United States Court of Appeals for the Tenth Circuit in Denver has upheld the validity of Swift Patent 2,544,844 and affirmed that this patent was infringed by McCullough Tool Company. The Opinion of the Court of Appeals has been published in the U. S. Patent Quarterly, Vol. 145, page 6, which is the advance sheet of April 5, 1965. The Opinion will also undoubtedly be carried in other legal reports. Since the Opinion is quite long we are not automatically sending copies; however, if you would like a copy of the Opinion, please let me know and I will send one to you."

"It has come to our attention that operations carried out by you infringe the Swift Patent. We are prepared to offer you a license at a reasonable royalty under this patent. We also have a number of other patents relating to radioactivity well logging under which we would be willing to grant you a license either singly or in any combination that you desire, also at a reasonable royalty. We have licensed the very great majority of wireline service companies under the Swift Patent."

"We understand that you have been offering services that infringe the Swift Patent in the past and we will expect settlement for past infringement at the time a

license agreement is signed. I shall be glad to meet with you to discuss this matter in the near future."

"We fully intend to continue to inforce the Swift Patent against unlicensed infringers by bringing suit in the Federal Courts."

As a result of the inference by Mr. Beaver in his letter dated May 7, 1965, I consented to take a license under the Swift Patent because I didn't feel I could fight the power of Dresser Industries, Inc.

On June 15, 1965, I signed a license agreement with Dresser Industries, Inc. under the Swift Patent. At the time I signed the agreement I said to Mr. Beaver, "I don't feel like I am doing the right thing because I don't feel that I infringe the Swift Patent by running Gamma Ray logs."

As a result of this license agreement, I was forced to make a higher charge to my customers. This higher charge is shown on the invoices to my customers as a royalty charge.

I have read this affidavit and the statements herein and they are true in accordance with my personal knowledge and belief.

/s/ Landon N. Roberts
Landon N. Roberts

State of Texas
County of Wichita

Subscribed to and sworn to before me on this 31st day of May 1966.

/s/ Jack Wallace
Jack Wallace
Notary Public in and for County
of Wichita, State of Texas.

My Commission expires 1 June 1967

Exhibit 5.

AFFIDAVIT OF RAYMOND F. RATHMAN

State of Texas
County of Wichita

RAYMOND F. RATHMAN, being first duly sworn, deposes and says:

I am in the business of making cased hole Gamma Ray logs and open hole Resistivity logs.

I do business under the fictitious name and style of Mike Rathman Logging Company.

I own and operate five (5) Gamma Ray logging tools, which I purchased from Radiation Engineering and Manufacturing Company. One of my Gamma Ray logging tools is designed to send the Gamma Ray signal and the casing collar signal independently up a single conductor. My other 4 Gamma Ray logging tools are designed to send the Gamma Ray signal up one conductor and the casing collar signal up two conductors which are separate and distinct from the conductor that the Gamma Ray signal is sent up.

In 1964 Dresser Industries, Inc. sued me for patent infringement and charged that surveys made by my single conductor Gamma Ray tool and my multi-conductor Gamma Ray tools infringed the Swift Patent No. 2,554,844.

In 1965, I signed a license agreement with Dresser Industries, Inc. under the Swift Patent No. 2,554,844. Mr. Jay G. Beaver of Dresser Industries, Inc. told me that under the license agreement I had to pay royalties on surveys made by my single conductor Gamma Ray tool as well as those made by my multi-conductor

Gamma Ray tools. Accordingly, I pay Dresser Industries, Inc. royalties on surveys made by my single conductor Gamma Ray tool and my multi-conductor Gamma Ray tools.

I have read the foregoing statements and they are true according to my personal knowledge.

/s/ Raymond F. Rathman
Raymond F. Rathman

State of Texas
County of Wichita

Subscribed to and sworn to before me on this 1st day of June 1966.

/s/ Jack Wallace
Jack Wallace
Notary Public in and for the
County of Wichita, State of Texas

My commission expires June 1, 1967.

Exhibit 6.

AFFIDAVIT OF WELTON B. WHANN

State of California
County of Los Angeles

WELTON B. WHANN being first duly sworn, deposes and says:

Attached hereto is a photocopy of a letter handed to affiant on June 3, 1966 by William T. Wofford, Esquire, attorney of record for Mike Rathman Logging Co. in Dresser Industries, Inc. vs. Mike Rathman Logging Co. in the United States District Court for the Northern District of Texas.

On June 3, 1966 Mr. Wofford advised affiant that the attached letter was received by him from James B. Simms, attorney for Dresser Industries, Inc. in connection with the above referred to case between Dresser Industries, Inc. and Mike Rathman Logging Co.

/s/ Welton B. Whann
Welton B. Whann

Subscribed and sworn to before me this 11th day of July, 1966.

/s/ Claire LaBrash
Notary Public in and for said
County of Los Angeles, State of
California

My Commission Expires: April 7, 1969.

(SEAL)

Browning, Simms, Hyer & Eickenroht
Attorneys at Law
P.O. Box 66026—3400 Montrose Blvd.
Houston, Texas 77006

July 10, 1964

Mr. Wm. T. Wofford
1704 First National Bank Bldg.
Fort Worth, Texas 76102

Re: Our File LW-9
Dresser vs. Mike Rathman
Logging Co.

Dear Mr. Wofford:

With regard to the various matters raised in your letter of July 8, 1964, all that we can go along with is the suggested waiver of paragraph 3.04(a). This could be done by a letter transmitting the executed agreement which would waive the provisions of the paragraph subject to the agreement of Mike Rathman Logging Company to keep sufficient information with regard to customers' names to permit this to be picked up on an audit if such an audit should ever become necessary under the provisions of paragraph 3.06.

Paragraph 3.05 is one which is insisted upon by Dresser and is in all of the eighty some odd licenses outstanding. It protects against the situation where either a licensee would have no price schedule covering a certain situation or would adopt a fictitiously low price schedule for the particular service covered by the patent when run in combination with other services.

It is, of course, Dresser's position that the Mike Rathman Logging Company operations come under the Swift

patent where the operations are run simultaneously whether they are conducted on a single conductor line or multi-conductor line. In view of this, the accounting previously requested is insisted on and the operation records should provide sufficient information to determine whether or not the particular operation was conducted simultaneously or non-simultaneously. If not, the logs themselves may be resorted to, to make this determination.

As to your inquiry regarding other Dresser patents, this was just something I wanted to call to your attention as you have a much more thorough knowledge of Rathman's equipment and operations than I have. It is true that if at a later date, an additional patent is desired to be included in the license, it can be licensed. The royalty rate will not change except as the base changes because it calls for payment of royalties on operations covered by the additional patents.

Please let me have your response at your early convenience.

Very truly yours,

BROWNING, SIMMS, HYER & EICKENROHT

/s/ James B. Simms

By James B. Simms

JBS:tbl

cc: Mr. R. W. Mayer
Mr. Jay Beaver
Mr. Edwin Luecke

In the United States Court of Appeals, for the Tenth Judicial Circuit, Sitting at Denver, Colorado.

Seventh Day, July Term, Friday, July 22nd, 1966.

Present: Honorable Alfred P. Murrah, Chief Judge, Honorable Orie L. Phillips, Circuit Judge, Honorable Warren L. Jones, Circuit Judge, Honorable Jean S. Breitenstein, Circuit Judge, Honorable Oliver Seth, Circuit Judge, Honorable John J. Hickey, Circuit Judge, And other officers as noted on the 14th day of July, 1966.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

McCullough Tool Company, Robert W. Pringle, Kenneth I. Roulston, George M. Brownell and Philip W. Martin, Appellants, 6952 vs. Well Surveys, Incorporated, and Dresser Industries, Inc., a corporation, Appellees.

McCullough Tool Company, Appellant, 6953 vs. Well Surveys, Inc., Appellee.

Appeals From the United States District Court for the Northern District of Oklahoma.

On consideration of appellants' motion to modify this court's mandate of March 14, 1966, to permit filing a motion in United States District Court for the Northern District of Oklahoma to vacate the interlocutory judgment entered March 16, 1961, with respect to Swift Patent 2,554,844 and to hold said patent invalid and non-infringed, to dissolve the injunction against appellant, McCullough Tool Company, and to permit the District Court to conduct such proceedings and

take such action as it may consider appropriate; appellants' motion to recall the mandate of March 14, 1966; and appellants' petition for rehearing;

It is ordered that leave to file the above described motions be and the same is hereby granted.

It is further ordered that each of the above motions be and the same are hereby denied.

A true copy as of record,

Teste:
ROBERT B. CARTWRIGHT, Clerk,
/s/ By WILLIAM L. WHITAKER
Chief Deputy Clerk

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IN THE

Supreme Court of the United States

October Term, 1966
No. 709

McCULLOUGH TOOL COMPANY, *et al.*,

Petitioners,

vs.

WELLS SURVEYS, INCORPORATED, *et al.*,

Respondents.

Brief of Respondents, Well Surveys, Incorporated, Et Al., in Opposition to Petition for Writ of Certiorari.

Opinions Below.

The findings of fact and conclusions of law in the United States District Court for the Northern District of Oklahoma are reported at 199 F.Supp. 374 and appear on pages 61a-117a of the Appendix to the original Petition for a Writ of Certiorari (hereinafter cited as Original Appendix). The opinion of the Court of Appeals for the Tenth Circuit is reported at 343 F.2d 381 and appears on pages 1a-57a of the Original Appendix.

The Petitioners filed their original Petition for a Writ of Certiorari herein on July 19, 1965 (No. 366, October Term, 1965). Following this Court's decision in *Graham v. John Deere*, 383 U.S. 1, decided February 21, 1966, this Court, on March 7, 1966, denied said

original petition. Thereafter, on March 14, 1966, the Court of Appeals issued its mandate to the District Court. On March 24, 1966, Petitioners requested and were granted an extension of time by this Court to petition for rehearing in order that they might "wholly evaluate" the effect of the decision in *Graham v. Deere* and other recent decisions of this Court upon this case. The Petitioners thereafter brought a Petition for Rehearing for Writ of Certiorari, *but the same was limited to misuse issues*. Said Petition for Rehearing was denied May 16, 1966.

On July 18, 1966, the Petitioners moved in the Court of Appeals to modify the mandate. On July 22, 1966, the Court of Appeals denied Petitioners' motion, this denial appearing on pages 37a and 38a of the Appendix to Petitioners' present Petition. The present Petition was filed October 20, 1966.

Jurisdiction.

The jurisdiction of this Court is invoked by Petitioners under 28 U.S.C. 1254(1). However, this Court does not have jurisdiction, because the Petition herein was filed outside the time limit provided in 28 U.S.C. 2101(c) and Rule 22 of this Court.

Constitutional Provision, Statute and Regulations Involved.

In addition to the constitutional provision and statutes adequately set forth by Petitioners, this case involves 28 U.S.C. 2101(c) which provides:

"Section 2101. Supreme Court: time for appeal or certiorari; docketing; stay

* * *

"(c) any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Rule 22 of the Supreme Court Rules provides in pertinent parts:

"Rule 22. Review on certiorari—time for petitions.

* * *

"3. A petition for writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within the time prescribed by law."

Questions Presented.

The Respondents disagree with the statement of Questions 1-5 presented in the Petition.

1. Question 1 as stated by the Petitioners is not presented by the record. The question, as stated, wrongly assumes a lack of compliance by the Tenth Circuit with the mandates of this Court. There is nothing in the record to support any such assumption. The only proper question for inquiry is whether or not the Court of Appeals correctly applied the applicable law as stated in Question 6.

2. The factual assumptions in Petitioners' statement of Question 2 are also incorrect. The second

question assumes that there was no factual basis to which the applicable law could be applied in determining the matter of validity. On the contrary, the factual bases of the lower courts' decisions are quite clear. Again, the proper question is only whether or not the Court of Appeals correctly applied the applicable law.

3. Question 3 also is based upon an incorrect statement of the record. It assumes that the courts below upheld the validity of the Swift patent by applying a test of "new and better results" rather than the statutory test of non-obviousness. Again, the only proper question is whether or not the courts correctly applied the applicable law, which they did.

4. Question 4 is very nearly the same as Question 3, and assumes that the Court of Appeals ignored tests laid down by this Court in *Graham v. Deere.* Although its opinion was handed down before the decision in *Graham v. Deere,* the Court of Appeals applied the statutory non-obviousness test as required by *Graham v. Deere.* The Court of Appeals was certainly not ignoring this Court by issuing its mandate pursuant to this Court's own denial of certiorari following *Graham v. Deere.* Again, the only proper question is whether or not the Court of Appeals correctly applied the applicable law.

5. Question 5 assumes that the Trial Court had not given consideration to the scope and content of the prior art, the differences between the prior art and the claims in issue and the level of ordinary skill in the art. This is contrary to the findings of the Trial Court and the opinion of the Court of Appeals, which clearly show that such consideration was given prior to applying the

statutory test of non-obviousness. The only proper question is whether or not this test was correctly applied.

6. Question 6 is the only question properly stated, and it is not timely presented.

Statement of the Case.

Petitioners' Statement of the Case is incomplete and in some respects inaccurate. The only significant statement in pages 6-11 is that contained on page 6:

> "The Swift patent discloses a simple structure, namely, a device for logging a well and at the same time locating the position of collars of a casing which previously was lowered into the well." Petition, p. 6.

We therefore here briefly restate the facts, giving particular emphasis to the facts in respect to the three inquiries to be made for determining patentability: scope and content of the prior art, differences between the art and the claims at issue, and the level of ordinary skill in the art.

1. The Scope and Content of the Prior Act.

The prior art was very ably presented to the Trial Court by counsel for Petitioners. The Petitioners extensively argued this art before the Court of Appeals, which made specific reference to each item of prior art in its opinion (Original Appendix, p. 14a). It is therefore difficult to see how Petitioners can now assert that there was a "total absence of real consideration of the 'scope and contents' of the prior art".

Although only the Ennis patent is specifically mentioned in the Swift findings, the Ennis patent was the

reference most particularly relied upon by the Petitioners in the Trial Court. In Finding 62 (Original Appendix, p. 89a), the Trial Court referred to *all* of the prior art and Ennis in particularly, as not anticipating the invention. Petitioners quote a portion of this finding on page 11 of their petition and characterize it as merely a finding of naked novelty not going to the question of obviousness. However, Petitioners carefully ignore the rest of Finding 62 which states:

> "The new combination of elements forming the Swift invention and their new mode of operation *were not obvious to those skilled in the art* at the time the Swift application was filed." (Emphasis added).

The Petitioners further assert that the various Schlumberger uses were not properly considered, referring particularly to the material shown in Exhibit A to the Petition which was part of the subject matter considered in the complete new trial on the issue of alleged public use. At the new trial, the Petitioners placed their primary emphasis upon alleged public use by Well Surveys, Inc. and Lane-Wells Company. However, *all* of the alleged public uses were considered at length and Findings 128-133 (Original Appendix, pp. 110a-112a) were entered. Although the Schlumberger uses were given secondary importance by Petitioners at the new trial, they now assert that insufficient findings were made in respect to such uses, and that the Court should have found that the Schlumberger tool recorded formations and casing collars simultaneously. To the contrary, the testimony of Dr. Bonner, uncontroverted at trial, showed that the Schlumberger equip-

ment could not make a formation log. As Dr. Bonner testified [Record, p. 769]:

> "So it seems clear that they designed this instrument and method so that they did not get any effect from normal radioactivity of the formation. That was their desire and wish and result."

This was fully supported by Mr. Rieke of Schlumberger. The whole matter was considered at length in the Trial Court and the record furnishes ample basis for Finding 133. (Original Appendix, p. 112a)

> "The use by Schlumberger Well Surveying Corp. of various forms of tools and equipment in performing LRM (locating radioactive markers) service prior to March 22, 1945, was not a prior public use of the invention covered by the claims of the Swift patent No. 2,554,844."

2. The Differences Between the Prior Art and the Claims in Issue.

Having fully considered the prior art, the Trial Court made detailed findings of the differences between such art and the Swift invention (Findings 54-60; Original Appendix, pp. 85a-88a), summarized as follows:

Prior to the invention of the Swift patent [Record, p. 1109] which was filed in 1946 and issued in 1951, the radioactivity well logging industry had not been able to solve the problem of accurate depth measurement and since depth measurement is just as important to a well log as the radiation measurement, the problem was very serious. This problem was first solved by the invention of the Swift patent which met with immediate and substantial commercial success.

Swift utilizes the collars connecting the successive sections of the well casing as bench marks to indicate depth and thereby produce an improved log. The Swift patent discloses and claims a well logging tool which, when lowered into the well, simultaneously produces radiation signals and collar location signals, combines said signals, transmits them to the surface, and then simultaneously records the signals to provide a log in which the radiation measurements are accurately correlated with depth by the casing collar record. The casing collar signals are primary depth measurements made separately at the same time and place as the radiation measurements, the two measurements being tied together at the place of measurement by combining the separate signals.

As both courts below held, the resulting log is essentially different from and more accurate than the logs wherein depths are determined by secondary measurements made at the surface, separated from the points of radiation measurement by the length of the cable in the hole, as was the prior practice. This is a new and useful result that no prior invention had ever achieved, and was the first satisfactory solution of the problem.

It is crystal clear from Findings 54-60, 132 and 133 that the Trial Court thoroughly considered the differences between the prior art and the claimed invention. It is equally clear from the decision of the Court of Appeals (pp. 13a-17a, Original Appendix) that that Court likewise fully considered said differences.

3. The Level of Ordinary Skill in the Art.

The Trial Court gave particular attention to the level of the ordinary skill in the art in determining the matter of non-obviousness. This is evident from Finding 62 quoted above, which states that the Swift invention "was not obvious to those skilled in the art." The level of ordinary skill in the art was determined by the Trial Court from the voluminous art offered in evidence and explained by Petitioners at the trials, and from the testimony of the expert witnesses.

Although Petitioners note that the court referred to the level of skill at the time the application was filed rather than at the time the invention was made as provided by statute, it is obvious that the invention had to be made prior to the date of the application and therefore that the ordinary skill in the art at the time of the application was at least as great as at the time the invention was made.

ARGUMENT.

1. The Same Question Has Been Presented Previously.

This Court denied Petitioners' previous Petition for a Writ of Certiorari on the statutory standard of patentability. On page 40 of their original Petition, Petitioners referred specifically to the grant of certiorari in the case of *Graham v. Deere* and on page 41 quoted the same part of the decision of the Court of Appeals as they now quote on page 10 of their present petition. In the previous petition (p. 40), Petitioners called attention to 35 U.S.C. 103 and presented the same question they are attempting to present here, *i.e.*, whether or not the Court of Appeals followed the statutory test of patentability. Question 6 of the present petition states the statutory conditions for patentability. This same question was raised by Question 4 of the previous petition which was denied.

It is evident that what Petitioners are presently complaining of is the test applied by the Court of Appeals in its opinion of March 17, 1965. The Petitioners now attempt to cast the question in a different light by referring to the case of *Graham v. Deere* rather than 35 U.S.C. 103 as referred to in the previous petition. Additionally, the Petitioners misstate the time relationship between the cases where they state on page 2 of their present petition that *Graham v. Deere* was first published *after* denial of certiorari in this case. The facts are, that the original petition herein was filed after certiorari had been granted in *Graham v. Deere*, and indeed the petition called attention to that fact. The petition remained pending for seven months, during which time *Graham v. Deere* was argued and decided, the decision being handed down February 21,

1966 and published in the United States Law Week the following day. Petitioners' original petition was *thereafter* denied by this Court on March 7, 1966.

Following the denial of the previous petition, the Petitioners requested, and on March 24, 1966, this Court granted, an extension of time to file a petition for rehearing. The basis of the request was the alleged need for time to consider the effect of *Graham v. Deere* preparatory to bringing a petition for rehearing. In the last paragraph of said request, Petitioners stated:

> "Moreover, it is quite clear from a consideration of this Court's opinion in *Graham et al. v. John Deere Co., et al.*, decided February 21, 1966, that both Courts below in the present case applied the wrong test under 35 U.S.C. §103 in sustaining the validity of the patents in suits."

The request for time was granted and the petition was subsequently brought, but without reference to *Graham v. Deere.*

The Petitioners now say that they failed to raise the matter in their petition for rehearing beceuse of a supposed similarity to the case of *McCullough v. Kammerer,* 323 U.S. 327 (1945). But in *McCullough v. Kammerer,* the matter upon which a writ of certiorari was sought had not been raised, litigated or passed upon below. Since there was no record upon which this Court might rule, it dismissed its writ of certiorari in the *Kammerer* case.

In the present case, it is perfectly evident that the matter of the application of the proper standard of patentability was raised below, that the Trial Court made findings of non-obviousness and that the Court of Appeals considered the basis for such findings and the

applicability of 35 U.S.C. 103. Therefore, in the present case there certainly was sufficient record upon which a petition could be based. This is further evidenced by the fact that the present petition is based upon the *same* record as the former petition, the courts below having done nothing since the previous petition but stand on their opinions.

Although the Court of Appeals' opinion herein was prior to the decision in *Graham v. Deere*, the entire record was complete at the time the first petition for certiorari was denied. The time, if any, when the Petitioners should have raised the decision in *Graham v. Deere* was in their petition for rehearing on their original petition for certiorari. Petitioners were at that time well aware of *Graham v. Deere* and any pertinence it may have had to the present case, for this was the basis of their obtaining an extension of time to file their petition for rehearing.

Petitioners' present petition is further evidence of their desire to prolong this litigation indefinitely so that Respondents will never obtain the relief to which they have been adjudged entitled. Since Respondents first obtained a judgment in the Trial Court on March 16, 1961, various participants have died, and Judge Savage is no longer on the bench. As this Court so aptly stated in *Toledo Scale Co. v. Computer Scale Co.*, 261 U.S. 399, 425 (1923):

> "As Mr. Justice Story remarked in Ocean Insurance Co. v. Fields, 2 Story, 59, 18 Fed. Cas. No. 10,406:
>
> > 'It is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal.' "

2. The Petition Is Untimely.

Although the petition purports to be a petition from a judgment entered July 22, 1966, that judgment was merely the denial of a motion to modify the mandate. The basic objection is as to the judgment entered March 17, 1965 and to the mandate issued March 14, 1966 effectuating that judgment. This petition was not filed until October 22, 1966, outside the ninety days permitted by 28 U.S.C. 2101(c) and Rule 22 of this Court, which started to run with the issuance of the mandate on March 14, 1966. Where a later decree makes no change of substance from an earlier decree, the time for petitioning for a writ of certiorari runs from the date of the first decree. *F.T.C. v. Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952). As the Court there states, on page 213, "litigation must at some definite point be brought to an end."

To be sure, where a timely motion to amend the decree is filed, the time runs from the date of the order overruling the motion. However, in the present case the motion to modify the mandate itself was not timely, nor was it the sort of motion that could automatically extend the time. The rules of the Court of Appeals do provide for motions for rehearing, and this Court permits petition for writ of certiorari within specified periods after the time of the denial of such motions for rehearing. However, there is no provision for endless motions to recall final acts of the Court of Appeals.

The mandate itself followed this Court's denial of the first petition for certiorari and was in keeping both with the Court of Appeals' decision and this Court's denial of such petition. The motion to modify the mandate was not brought until July 18, 1966, more than

three months after the mandate was issued on March 14, 1966. By that time the Petitioners had exceeded their time for filing a petition for certiorari to the mandate. They may not extend the time after it has expired merely by filing a motion. *F.T.C. v. Minneapolis-Honeywell Co., supra.* To permit a motion to set aside such final decisions and to further delay the final determination of this case would indeed make this suit immortal.

3. The Courts Below Correctly Applied the Statutory Standards of Patentability to the Facts of This Case.

(a) The Courts Applied the Statutory Standard of Patentability.

Although the present Petition should be denied because the same question was raised in the first Petition and because the present Petition is untimely, the primary reason why this second petition should be denied, is that the courts below did follow the proper statutory standard of patentability as set forth in 35 U.S.C. 103. Although the *Graham v. Deere* case had not been decided at the time of the decisions of the Trial Court and Court of Appeals herein; both courts adhered to the non-obviousness rule as stated in the statute and as later reiterated by this Court in *Graham v. Deere.* Contrary to the Petition, there is no irreconcilable conflict between the decisions herein and the statute or *Graham v. Deere.* Both courts below specifically found the Swift invention to differ from the prior art in a manner not obvious to those skilled in the art.

Petitioners assert that the Court of Appeals erred in following the test of "new or better results". This is

certainly not the case. As the Court of Appeals noted (Original Appendix, p. 14a), it was the Petitioners who contended for the test of new and useful result relying on *Great Atlantic & Pacific Tea Company v. Supermarket Equipment Corp.*, 340 U.S. 147 (1950). That case stated that mere aggregation of a number of old parts or elements which, in the aggregation perform or produce no new or different function or operation than previously performed or produced by them, is not a patentable invention. It was in response to this contention by Petitioners that the Trial Court and Court of Appeals found that a new and useful result was obtained. At the same time, they applied the statutory test and found the Swift invention to be non-obvious to those skilled in the art.

The Trial Court found

> "62. The prior art, and particularly the Ennis patent, does not anticipate Swift. The new combination of elements forming the Swift invention and their new mode of operation were not obvious to those skilled in the art at the time the Swift application was filed." (Finding 62, Original Appendix, p. 89a).
>
> "64. The well logging apparatus with casing collar locator defined by the claims in issue of the Swift patent is of great utility and value; it was not obvious, but was the result of invention by the patentee; and it is not anticipated by, but displayed substantial inventive advance over, the prior art in evidence." (Finding 64, Original Appendix, p. 90a)

In affirming, the Court of Appeals gave particular attention to these findings and concluded that the Swift

device was not obvious to one skilled in the art and displayed substantial inventive advance over the prior art. (Original Appendix, pp. 14a and 17a) The Court of Appeals further stated:

> "The general rule is that before a device may be patentable, the improvement over the prior art must involve more than would be obvious to one of ordinary skill in the art." (Original Appendix, p. 30a).

There is no room for doubt that the courts below had the proper rule in mind.

(b) The Courts Below Made the Proper Factual Inquiries.

The Petitioners complain that the findings of the Trial Court were inadequate to sustain the judgment of validity on the basis of unobviousness. As shown in the above Statement of the Case, the Trial Court considered the prior art in great detail. Petitioners' own Statement of the Case is replete with references to the prior art extracted from the record before the Trial Court. The Trial Court further made findings in respect to such art as Petitioners requested. There is no requirement in the decision of *Graham v. Deere* that the Trial Court make voluminous detailed findings in respect to each item of prior art. Obviously the prior art documents speak for themselves, and there is no reason why the findings should include the entire record. Rather, the Trial Court in this instance reasonably referred to the Ennis patent, which was the most pertinent prior art brought to its attention by Petitioners. Certainly the Court of Appeals had no

difficulty in determining the state of the prior art without further findings on the subject.

That the findings in this case are sufficient for a determination of non-obviousness is indicated by the findings of fact in the case of *United States v. Adams*, 383 U.S. 39 (1966), a companion case to *Graham v. Deere*. These findings are recorded in *United States v. Adams*, 330 F.2d 622 (Ct. Cl. 1964). Findings 22, 23 and 24 are the only findings directed to non-obviousness, and they are not as detailed as the findings herein, yet this Court ruled that the proper inquiries had been made and the proper tests applied.

Requiring a determination of the scope of prior art and a consideration of the differences between such prior art and the case at issue is not the same thing as requiring detailed findings. It is evident from the findings herein that the Courts below fully understood the Swift invention and carefully compared the Swift invention with the prior art as presented by Petitioners. They properly made the determination that the differences were such as to be not obvious to those skilled in the art.

It is quite apparent that the basic factual inquiries were made by the courts below and that they applied the proper statutory test of non-obviousness. The findings of fact in this case in respect to non-obviousness are sufficient to support the judgment and are adequately supported in the record. They are not to be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a).

Conclusion.

The Petition was not brought in time. It raises only matters that were determinable at the time of the original Petition herein, and it was filed more than three months after the decision and mandate complained of. Further, there is no conflict between the rule followed by the Court of Appeals in this case and this Court's decision in *Graham v. Deere.* The Court of Appeals has correctly applied statutory tests of non-obviousness. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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October Term, 1966
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McCULLOUGH TOOL COMPANY, *et al.*,
Petitioners,

vs.

WELLS SURVEYS, INCORPORATED, *et al.*,
Respondents.

Reply Brief in Support of Petition for Writ of Certiorari.

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Reply Brief in Support of Petition for Writ of Certiorari.

Respondents' Brief avoids squarely meeting the issue raised in Petitioners' Petition. The Trial Court's Findings relate to novelty or anticipation, and utility under 35 U.S.C. 101 and 102.

There is a total absence of Findings of Fact relating to 35 U.S.C. 103, and the Trial and Appellate Courts did not consider the three factual inquiries required by *Graham, et al. v. John Deere Company of Kansas City, et al.*, and associated cases, 383 U.S. 1, 15 L. Ed. 2d 545, and did not make a determination as to whether or not "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains". (35 U.S.C. 103.)

What the Trial Court and Appellate Court did was to base their holdings of infringement on the fact that the Swift assembly produced a new or better result.

In Respondent's Brief, Respondent was unable to call to this Court's attention actual Findings on the three factual inquiries as required by *Graham, et al. v. John Deere, et al., supra,* but rather, referred to conclusionary findings, which, as pointed out in the Petition for Certiorari, do not even attempt to, nor were they prepared for the purpose of considering the real test under 35 U.S.C. 103, as required by the Supreme Court in the *Graham, et al. v. John Deere, et al.* and associated cases. The argument that the evidence was before the Court and that the Court must necessarily have considered the evidence and the factual inquiries of *Graham, et al. v. John Deere, et al.* is fallacious; and the Findings of Fact of the Trial Court and the Opinion of the Court of Appeals are the best evidence that these matters were completely overlooked and the decision of patentability based solely on new or better results.

Petitioner emphasizes again the necessity for a Writ of Certiorari which will be effective in causing the Tenth Circuit to comply with the law as laid down by this Court, and this is particularly true because if, in the pending case of *Well Surveys, Inc. v. Perfo-Log, Inc.,* Civil Action No. 9542, pending in the United States District Court for the Western District of Oklahoma, which involves the Swift patent the Court will

most likely follow the Tenth Circuit, and apply the false test of "new or better results" which the Court of Appeals for the Tenth Circuit in *Well Surveys, Inc. v. McCullough Tool* declares to be the law of that Circuit.

Granting of the Petition is respectfully solicited.

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